CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 164

PIEDMONT AND NORTHERN RAILWAY COMPANY AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

FILED JUNE 13, 1929

(34,295)

(34,295)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 164

PIEDMONT AND NORTHERN RAILWAY COMPANY AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

INDEX

	Original	Print
Record from the district court of the United States, Western South Carolina	1	1
Caption (omitted in printing)	1	
Petition	2	1
Exhibit "A"—Application of P. & N. for certificate of public convenience	18	11
Exhibits "D-2," "B-2," "B-3"—Maps	40*a*	28
Exhibit "B"—Motion to dismiss application	41	28
Exhibit "C"—Order and report of I. C. C. re proposed construction of lines by P. & N.	43	29
Marshal's returns	109	80
Certificate of disqualification of Watkins, J. (omitted in printing)	111	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 27, 1929

	Original	Print
Designation and assignment of Soper, J. (omitted in printing)	112	
Order with reference to intervention petition of Southern Railway Company et al	114	81
Intervention petition of Southern Railway Company et al	115	82
Order allowing intervention of Southern Railway Company et al	119	85
Answer of intervening defendant railways	121	86
Intervention of Interstate Commerce Commission	137	96
Order allowing intervention of Interstate Commerce Commission	138	97
Motion to dismiss and answer of Interstate Commerce Commission	139	97
Answer of the United States	144	101
Petition of the National Association of Railroad and Utilities Commissioners for leave to intervene	153	107
Intervening petition of the National Association of Railroad and Utilities Commissioners	157	110
Order allowing intervention of the National Association of Railroad and Utilities Commissioners	160	112
Statement of evidence	162	112
Offer in Evidence—Letter from B. H. Meyer to W. S. Lee	162	112
Statement of Governor John G. Richards of S. C.	164	114
Statement of Governor A. W. McLean of N. C.	165	115
Statement of Mr. Sam Blease, chairman of R. R. Com. of S. C	165	115
Statement of Mr. A. J. Maxwell	166	116
Testimony of W. S. Lee	166	116
Statement as to Exhibit 1	168	117
4	172	121
5	172	121
6	172	121
7	173	122
8	174	122
9	174	123
10	174	123
11	174	123
12	174	123
13	174	123
14	175	123
20	180	129
110	183	131
Testimony of E. Thomason	185	132
Exhibit No. 115—Excerpt from argument before Commission, case No. 11,774	197	143

	Original	Print
Testimony of John Arrington	203	150
J. S. Cureton	204	151
W. W. Watt	208	154
H. L. McLaren	208	155
Chas. O. Hearon	208	155
W. H. Henley	209	155
E. B. Hardin	209	155
Carl E. Anderson	209	156
George W. Burpee	210	156
Statement re Exhibits 44 and 45	210	156
Testimony of J. H. Separk	212	158
W. H. Wood	213	158
W. T. Rankin	213	159
John L. Gilmer	213	159
J. L. Graham	214	159
C. F. Bauserman	214	160
H. R. Stephenson	215	161
L. W. Farris	216	161
W. S. Creighton	216	161
C. R. Capps	218	163
B. Herman	222	167
A. H. Plant	223	168
G. H. Kerr	226	170
E. R. Oliver	228	172
L. F. De Ramus	234	177
Lincoln Green	236	178
Offers in evidence	246	186
Testimony of Joseph G. Kerr	247	187
Statements re Exhibits 119-120	248	188
Testimony of A. W. Anderson	252	191
Ernest Williams	253	193
C. McD. Davis	255	194
J. E. Cureton (recalled)	258	197
W. J. Edwards	259	198
Offer in Evidence—Report of C. P. Howard	260	198
Exhibit 1—Information requested by C. P. Howard.	264	204
Exhibit 2—Proportion of total freight, passenger, and excess revenue derived from business interchanged with connecting lines and what from purely local, station to station	265	205
Exhibit 5—Statement of miles of track, showing miles operated jointly with street cars, also miles of track in streets	266	207
Exhibit 6—Points of interchange with railroads	267	208
Exhibit 7—Freight and passenger revenue, years 1913-1926, inclusive	267	208
Stipulation re statement of evidence	268	209
Order approving statement of evidence	269	210

	Original	Print
Exhibit No. 1—Map of North and South Carolina (omitted in printing)	269a	
Exhibit No. 7—An act of General Assembly, State of South Carolina, incorporating Piedmont & Northern Railway	269b	210
Exhibit No. 8—An act to amend an act of General Assembly, State of South Carolina, incorporating P. & N. Railway Company, approved February 24, 1911	269n	217
Exhibit No. 70—Railroad map of the States of North and South Carolina (omitted in printing)	269v	
Exhibit No. 73—Railroad map of the States of North and South Carolina (Southern Railway System) (omitted in printing)	269w	
Opinion, Soper, J	270	222
Final decree	302	251
Docket entries	303	252
Assignments of error	309	258
Præcipe for transcript of record	311	260
Order extending time	314	261
Memorandum re appeal papers	315	262
Clerk's certificate (omitted in printing)	316	
Petition for appeal	317	262
Assignments of error	318	263
Order allowing appeal	321	265
Bond on appeal (omitted in printing)	323	
Notices of appeal	327	266
Citations and services (omitted in printing)	331	
Orders extending time	355	267
Statement of points	357	268

[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

[fol. 3] **IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA**

In Equity

PIEDMONT AND NORTHERN RAILWAY COMPANY, Petitioner,

versus

UNITED STATES OF AMERICA, Defendant

PETITION TO ENJOIN, SET ASIDE AND ANNUL ORDER OF INTERSTATE COMMERCE COMMISSION—Filed May 22, 1928

To the Honorable Judges of the District Court of the United States for the Western District of South Carolina:

The Piedmont and Northern Railway Company, a corporation of the State of South Carolina, files this its petition to enjoin, set aside and annul an Order, hereinafter referred to and made a part of this petition, of the Interstate Commerce Commission (hereinafter called the "Commission"), a Commission existing under and by virtue of an Act of Congress of February 4th, 1887, entitled "An Act to Regulate Commerce," and the Acts amendatory thereof and supplementary thereto (hereinafter referred to as the Interstate Commerce Act"), and thereupon respectfully shows to the Court:

[fol. 4] I

Petitioner is now, and at the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the Laws of the State of South Carolina, owning and operating a line of interurban electric railway in said State, extending from Greenwood to Spartanburg, a distance of 89.9 miles, with a branch from Belton to Anderson of 11.3 miles; and a line of interurban electric railway

in the State of North Carolina, extending from Gastonia to Charlotte, a distance of 25.3 miles, with a branch to Belmont of 3.2 miles; and is and was at such times using said lines of railway in the transportation of persons and property in interstate commerce as a common carrier, subject to the provisions of the Interstate Commerce Act, and the amendments thereto, except those provisions which do not extend to or regulate or control, or authorize the Commission to regulate or control, interurban electric railways not operated as a part or parts of a general steam railroad system of transportation. Petitioner has its principal office in the City of Greenville, in the Western District of South Carolina.

II

This suit is brought to enjoin, set aside and annul an Order of the Commission. It arises under the Laws of the United States, particularly under the Interstate Commerce Act, and amendments thereto, and is instituted under the provisions of said Act, and of the Act of Congress entitled, "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year One Thousand Nine Hundred and Thirteen, and For Other Purposes," approved October 22nd, 1913 (38 Stat. at Large, 218, Ch. 32); and petitioner invokes the jurisdiction of this [fol. 5] Court under the provisions of said Act and of U. S. C., Title 28, Sec. 41, Subd. 28; and also the general equity jurisdiction of this Court.

III

The Order of the Commission hereby sought to be enjoined, set aside and annulled, was made and entered by the Commission in a proceeding instituted by petitioner on March 26th, 1927, when petitioner filed an application under Paragraph 18, of Section 1, of the Interstate Commerce Act for a certificate, if deemed to be necessary, that the present and future public convenience and necessity require that it complete its interurban electric railway lines by constructing a line from Spartanburg in a northeasterly direction to Gastonia, approximately 53 miles, thereby connecting the North Carolina and South Carolina segments of

its existing lines, and a line from Charlotte in a northeasterly direction to Winston-Salem, about 75 miles. This application was placed upon the Finance Docket of the Commission as No. 6208; and a copy thereof is hereto attached, marked Exhibit "A," and made a part of this petition. It was filed by petitioner at the suggestion of the Commission, and without prejudice to petitioner's right to assert, and petitioner did assert upon the grounds and for the reasons alleged in said application, that the authority of the Commission conferred by Paragraphs (18) to (21), both inclusive, of Section 1 of the Act, does not extend to petitioner, and that the Commission was without jurisdiction of the lines which petitioner proposed to construct; and the Commission was requested to segregate and first pass upon the question of jurisdiction involved. Thereafter, on April 9th, 1927, petitioner, as the applicant in said proceedings before the Commission, filed a motion to [fol. 6] dismiss the application for lack of jurisdiction, upon the grounds set forth in said motion, a copy of which is attached hereto, marked Exhibit "B," and made a part of this petition. This motion was argued before Division 4 on April 22nd, 1927, but the consideration thereof was deferred until after the hearing on the merits of the application.

IV

The Commission assigned said proceeding for hearing on the merits at Charlotte, North Carolina, on June 20th, 1927, before Examiner Davis, and the hearing, in accordance with this assignment, began on June 20th, 1927, and closed at 12:00 o'clock Noon on June 29th, 1927.

Petitions intervening in support of the application were filed by the States of North and South Carolina, each represented by its Governor and Attorney General, the Corporation Commission of North Carolina, the Railroad Commission of South Carolina, the Counties of Forsyth, Davidson, Rowan, Mecklenburg and Gaston in North Carolina, and the Counties of Cherokee, Spartanburg, Greenville, Anderson and Greenwood in South Carolina, and by the following cities and towns, to-wit: Winston-Salem, Lexington, Salisbury, Charlotte, McAdenville, Belmont, Lowell, Gastonia and Kings Mountain in North Carolina, and Blacks-

burg, Gaffney, Spartanburg, Greer, Greenville, Anderson, Belton, Williamston, Honea Path and Greenwood in South Carolina, and by various civic and trade organizations and many individual shippers.

The National Association of Railroad and Utility Commissioners also intervened in support of the motion to dismiss the application for lack of jurisdiction.

The Southern Railway Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway Com- [fol. 7] pany, the Carolina, Clinchfield and Ohio Railway Company, the Louisville and Nashville Railroad Company, and the Charleston and Western Carolina Railway Company, intervened in opposition to the application, and except by these carriers there was no opposition to the application.

On October 6th, 1927, the Examiner filed his proposed report and findings, which were adverse to petitioner, both on the question of the jurisdiction of the Commission and also on the merits of the application for a certificate.

V

The petitioner, as applicant in said proceeding, and the parties who had intervened in support of the application, filed exceptions to the proposed report, and oral argument upon the report and the exceptions thereto was had before the full Commission on December 9th and 10th, 1927.

On April 3rd, 1928, the Commission issued its report sustaining the conclusions of the Examiner, and on said date issued its Order denying petitioner's application. Commissioner Eastman filed a separate concurring report. Commissioner McManamy filed a dissenting report, in which Commissioner Esch joined, and in which they concluded that the certificate should be granted. Commissioner Brainerd filed a separate dissenting report, expressing the opinion that the Commission was without jurisdiction of the proceedings inasmuch as petitioner is an interurban electric railway not operated as a part of a general steam railroad system of transportation, and that, therefore, the authority of the Commission, conferred by Paragraphs (18) to (21), both inclusive, of Section 1 of the Interstate Commerce Act, as amended, does not extend to the

construction of the lines described in the application, and [fol. 8] he concluded that the motion to dismiss the application for lack of jurisdiction over the subject matter should have been granted.

A copy of the Order of the Commission, and of its Report, which is made a part of the Order, and also copies of the concurring report and of the dissenting reports, are hereto attached, marked Exhibit "C," and made a part of this petition.

VI

The authority of the Commission, conferred by Paragraphs (18) to (21), both inclusive, of Section 1 of the Interstate Commerce Act, as amended, does not extend to interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation, and petitioner shows that the Commission has no authority over the construction of the lines of railway which petitioner proposes to construct, as hereinbefore alleged, and as alleged and described in its application filed with the Commission, and that the Commission was without jurisdiction of said application, and its order refusing to dismiss said application and taking jurisdiction over the subject matter thereof is null and void for the following reasons, among others, to-wit:

(a) That petitioner's railway is an interurban electric railway throughout all of its lines and parts as aforesaid, and is not now, nor has it ever been, operated as a part or parts of a general steam railroad system of transportation; and the lines of railway which it proposes to construct and operate, as hereinbefore alleged, and as alleged in its application filed with the Commission, will be operated as a part of petitioner's interurban electric railway and not as a part or parts of a general steam railroad system of transportation.

Petitioner's lines of railway connect and tie in with the [fol. 9] street railway systems of the cities and towns through which its lines extend. Petitioner owns and operates the street railway system of Gastonia, North Carolina, and has trackage rights over the street railway systems of Charlotte, North Carolina, and of Greenville and Anderson, South Carolina.

The new mileage would connect and tie in with the street railway systems of Winston-Salem and Salisbury, North Carolina, and petitioner would have trackage rights over said systems.

The street railways in the cities to which petitioner's present lines extend serve to collect and distribute freight locally, and the street railways in the cities to which its new lines would extend would serve the same purpose.

Petitioner's passenger cars, locomotives and motor cars are designed to operate, and do operate, around sharp curves, as in cities; its cars and trains make frequent stops, so as to serve the local needs for interurban freight and passenger service; which stops average 1.2 miles apart.

Its passenger cars are motivated by self-contained motor units, except a few trailers which are attached to cars containing such motor units; the type of construction of the line is that of a standard interurban electric; power is furnished by overhead control; a 1,500 direct voltage is used on the interurban mileage between cities and at places within some of the cities; the voltage used in the street railway service on the street railway lines in the cities is about 600, and there is a switch arrangement provided on all of petitioner's locomotives and cars whereby the voltage coming into the motors is reduced, as immediate conditions require, from 1,500 to 750 volts, which may be operated over the 600-volt lines.

[fol. 10] The operating methods of petitioner are like those of other interurban electric lines, and its operating personnel is drawn largely from street railways; its service is more elastic than that of steam railroads and approaches a switching service over its entire line, inasmuch as its freight trains are run in small units, which permits rapid switching.

Its freight trains are run more frequently and make more frequent stops than those of steam railroads, and they set out and pick up cars all along petitioner's lines, so that freight and passenger interurban electric service is afforded to the territory traversed by petitioner's lines.

In all other essential respects the location, construction, equipment, facilities and mode of operation of petitioner's said railway throughout all its lines and parts are characteristic of the class of railways commonly known and de-

scribed as electric interurban railways and not of the class commonly known and described as steam railroads.

The new lines, hereinbefore described, which petitioner proposes to construct and operate, will be operated as a part of petitioner's interurban electric railway and will have the same characteristics, and be operated in the same manner, as its present lines.

That prior to the action upon the petitioner's application as aforesaid, the Commission had not treated the petitioner as other than an electric interurban railway not operated as a part of a steam railroad system; that the Commission has not treated the petitioner as subject to the Valuation Act; that the petitioner has been governed by the accounting rules of the Commission applicable to electric railways and not to the accounting rules governing steam railroads; that the Railroad Labor Board ruled that [fol. 11] the petitioner was an interurban electric railway not part of a steam railroad and therefore not subject to the jurisdiction of said Board; that in October, 1920, the Commission made an informal ruling that the petitioner was not subject to the provisions of the Transportation Act relating to the issue of securities; that the conditions of operation on, and the characteristics and facilties, of petitioner's lines, were well known to the Commission at the time of its said ruling and that there never was any misrepresentation of any sort made to the Commission with respect to the said characteristics of the operations and the facilities of the petitioner.

(b) That there was no evidence before the Commission that petitioner's interurban electric railway is now or has ever been, or that the new lines which it proposes to construct and operate will be, a railway other than an interurban electric railway, or that said railway is, or said new lines will be operated as a part or parts of a general steam railroad system of transportation.

(c) That the evidence before the Commission shows that petitioner's railway is an interurban electric railway, and that it proposes to construct and operate the lines of railway hereinbefore described and described in its application filed with the Commission, as a part of petitioner's said interurban electric railway, and that neither its present lines are or have been nor will its new lines be operated as

a part or parts of a general steam railroad system of transportation.

(d) That the facts found by the Commission and stated in the Report which is made a part of the Order of the Commission, show, and upon said facts the Commission should have concluded as a matter of law, that petitioner's railway is, and the new lines which it proposes to construct [fol. 12] and operate will be, an interurban electric railway which is not and will not be operated as a part or parts of a general steam railroad system of transportation; and the Commission, therefore, should have dismissed petitioner's application for lack of jurisdiction, and the Order of the Commission taking jurisdiction of said application is null and void.

VII

The authority of the Commission conferred by Paragraphs (18) to (21), both inclusive, of Section 1 of the Interstate Commerce Act, as amended, does not extend to projects undertaken by a carrier prior to the effective date of said Paragraphs of the Act, which was approved February 28th, 1920; and petitioner shows that the Commission has no authority over the construction by petitioner of the new mileage hereinbefore described and also described in petitioner's application filed with the Commission, and that the order of the Commission taking jurisdiction of said application and denying the same on the merits, is null and void for the following reasons, among others, to-wit:

(a) That said new mileage will constitute necessary and essential parts of a line of railway, the construction of which was undertaken by petitioner and those who caused it to be organized and incorporated, and which was in part completed and put into operation prior to the effective date of said Paragraphs.

Petitioner was incorporated by Special Act of the Legislature of South Carolina, adopted February 24th, 1911, as a means of carrying out the plan and project, of those who caused it to be organized, to construct, acquire, equip and operate an electric interurban railway through the Pied- [fol. 13] mont Section of North and South Carolina from Greenwood and Anderson in South Carolina on the South

to Durham and Winston-Salem in North Carolina on the North, extending through the principal cities and towns of said Piedmont Section; that said plan was announced to the public; that a syndicate was formed and stock was offered to and subscribed for by the public and bonds were issued secured by mortgage to procure capital for carrying out said plan and that engineering work was done in furtherance of the construction thereof, all being prior to May 28th, 1920; that the section of petitioner's line between Charlotte and Gastonia was completed and put into operation in July, 1912; the section from Greenwood to Greenville in November, 1913, and the section from Greenville to Spartanburg in April, 1914; that said sections of petitioner's line of railway would not have been constructed except as a part of the project to construct and complete a line of interurban electric railway through the Piedmont section of North and South Carolina, as above set forth; that although after the construction of said line to Spartanburg it was found necessary, or at least advisable, temporarily to suspend further construction, the project of completing said line of interurban electric railway as originally planned, and as hereinbefore alleged, was never abandoned, and petitioner proposes to construct said new mileage and operate the same as a part of its interurban electric railway, so as to carry out and complete said project as originally planned prior to the effective date of said Paragraphs.

(b) That the evidence before the Commission showed, and upon the evidence the Commission should have found, that the construction of the new mileage hereinbefore described, which petitioner proposed to construct and put into operation, will not constitute an extension or exten- [fol. 14] sions of a line of railway, nor a new or additional line or lines of railway undertaken since May 28th, 1920, but that it will only carry forward to completion a line of railway, the construction of which was undertaken by petitioner and those who caused it to be organized, and which it and they in part completed and put into operation prior to the effective date of said Paragraphs; and the Commission, therefore, should have dismissed petitioner's application for lack of jurisdiction, and the Order of the Commission taking jurisdiction of said application was null and void.

VIII

If the aforesaid Order of the Interstate Commerce Commission is not set aside and annulled, petitioner will be prevented from constructing the new mileage aforesaid and operating the same as a part of its interurban electric railway, as a common carrier of passengers and property in interstate commerce, and will suffer and continue to suffer great and irreparable loss and damage, and in particular, petitioner alleges, and the evidence before the Commission shows, (1) that the construction of said new mileage and the operation of same by petitioner as a part of its interurban electric railway through the Piedmont Section of North and South Carolina will provide transportation facilities and service for that section, which are much needed and for which there is a wide-spread and insistent demand, so that said railway, if completed, will be successfully and profitably operated by petitioner; and (2) that it is necessary for petitioner to construct said new mileage in order to safeguard and protect its investment in its present mileage, inasmuch as petitioner can operate its present lines successfully only so long as it can maintain [fol. 15] friendly relations with the other carriers operating in said territory, for the reason that petitioner is dependent upon such other carriers for the transfer of traffic from one part of its line to another and for an outlet to outside territory; whereas the construction of the link between Spartanburg and Gastonia would connect petitioner's existing lines, and the construction of the link to Winston-Salem would give it a connection with the Norfolk and Western Railway Company, which does not compete with petitioner in the territory in which it operates and would thereby afford petitioner an independent and non-competitive connection with outside territory.

IX

That the defendant threatens to, and will unless enjoined, take proceedings to enforce the Order of the Commission complained of, by subjecting the petitioner to prosecutions for fines and penalties, in the event that petitioner should proceed with the construction of the new mileage aforesaid.

X

In consideration whereof, and inasmuch as petitioner is remediless in the premises, and by the strict rules of com-

mon law, and to the end that it may obtain the relief to which it is entitled, petitioner prays:

1. For a permanent injunction decreeing that the Commission was without jurisdiction of the application of petitioner, hereinbefore referred to and made a part of this petition as "Exhibit A," and that the Order of the Commission of April 3rd, 1928, taking jurisdiction of said application and denying the same, be set aside and annulled, and that the Commission be forever enjoined from taking [fol. 16] any action or proceeding against your petitioner under said Order; and that upon the filing of this petition due proceedings shall be taken herein pursuant to the Statute and in accordance with the practice of this Court.

2. For such other and further relief as may be proper in the premises.

This 21st day of May, 1928.

Piedmont and Northern Railway Company, by E. Thomason, Vice-President and General Manager. Charles E. Hughes, Cameron Morrison, Norman A. Cocke, H. J. Haynsworth, R. S. Hutchison, W. S. O'B. Robinson, Jr., Solicitors for Piedmont and Northern Railway Company.

[fol. 17] *Duly sworn to by E. Thomason. Jurat omitted in printing.*

[fol. 18] **Exhibits to Petition**

EXHIBIT "A"

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket, No. —

In the Matter of the Application of PIEDMONT AND NORTHERN RAILWAY COMPANY Respecting the Completion of Certain Portions of Its Lines and for a Certificate of Public Convenience and Necessity in Connection Therewith if Deemed to be Necessary

Application

To the Honorable The Interstate Commerce Commission:

Your applicant, Piedmont and Northern Railway Company, respectfully shows:

(a) That its exact corporate name is Piedmont and Northern Railway Company, and that it is a corporation created and existing under the laws of the State of South Carolina.

(b) That your applicant is a carrier by railroad subject to the Interstate Commerce Act. For reasons to be pointed out hereafter, it is the position of the applicant that it is [fol. 19] not subject to the provisions of the Act embodied in paragraphs 18 to 21 of Section 1 or Section 20a.

(c) That your applicant proposes to complete the construction of certain portions of its lines. At the times when your applicant's mileage now in operation was constructed, the completion of certain portions of its lines was suspended and deferred after important work in connection therewith had been done. The present operated lines are portions of applicant's entire project, and the work now to be resumed is in furtherance of the completion of the lines of which the existing portions are parts.

(d) That your applicant has not yet definitely determined upon its general plan for financing said construction but your applicant will hereafter submit to the commission an application for authority to issue any securities that it may desire to issue and sell to defray the cost thereof, unless as a result of the disposition of this application it shall be concluded that this applicant is not subject to Section 20a of the Interstate Commerce Act.

(e) The applicant is independently owned and, except as a connecting carrier, has no relation, traffic or financial, with any other operating or non-operating railroad corporation or corporations, but it uses certain street railway and other tracks under trackage arrangements.

(f) That your applicant does not desire permission to retain the excess earnings, if any, derived from such new construction, pursuant to the provisions of paragraph 18 of Section 15a of the Interstate Commerce Act.

(g) The reasons briefly stated why the present or future public convenience and necessity require or will require the [fol. 20] proposed construction are as follows: At the present time the operated lines of the company extend from Spartanburg, South Carolina, through Greenville to Ander-

son and Greenwood in that State, and from Gastonia, North Carolina, to Charlotte in that State.

It was contemplated from the beginning, however, that the project should consist of an interurban railway extending from Greenwood and Anderson on the south to Winston-Salem and Durham on the north, to be completed as and when conditions permitted. The work in contemplation is:

(1) To construct that portion of the line lying between Spartanburg, South Carolina, on the south and Gastonia, North Carolina, on the north, a distance of approximately 53 miles;

(2) To construct that portion of the line from Charlotte, North Carolina, on the south, to Winston-Salem in that State on the north, a distance of approximately 75 miles.

Both of these pieces of construction are and are regarded and have always been regarded as essential portions of the line, and it is now thought that conditions permit such construction. In fact, much work has already from time to time been done to that end. The territory tributary to the line thus to be completed, and which may generally be described as the Piedmont Section of North and South Carolina, is undergoing intensive industrial development along lines which involve extensive and increasing shipments of materials, supplies, and finished products to and from points in the territory. In that section there is available, over three thousand miles of high-tension transmission line serv- [fol. 21] ing 160 communities, hydro-electric development with a capacity of 879,000 h. p., delivering annually 1,400,-000,000 k. w. hours. The cotton mills alone purchase $68,-480,000 worth of supplies and equipment every year and the Carolinas import annually $332,000,000 worth of food and food products. As a result of the phenomenal development, during the period of time in which the general riches have increased 35% per capita in the nation's five richest states, the per capita increase in Piedmont Carolinas has been over 105%.

Without attempting in this application to give exact figures or even to state what has been accomplished, it is well known that the Piedmont Carolinas have shown and are showing phenomenal development in the amount of electric power—hydro and steam—generated and consumed; the

number of industries in operation and the amount of capital invested in them; the number of persons furnished employment; the financial resources available; capital invested in banks; bank deposits; the value of raw materials used and converted and of finished products produced. These developments are due in large part to the fact that the Piedmont Section enjoys unexcelled healthful conditions and an unsually large supply of efficient, industrious, native labor and expanding transportation facilities, and the central location enjoyed in relation to world market.

Great as has been the development in the past, it is going on today and will continue to go on more rapidly than heretofore. Demands upon the carriers for transportation are certain to increase and additional transportation facilities must be provided if the development of the territory is to go on. Transportation facilities designed and operated particularly to serve the local need must be provided with improved and increasing connections between those [fol. 22] local facilities and carriers reaching outside territory. The importance of efficient transportation of an interurban character providing local elasticity and flexibility and serving particularly the local need cannot easily be over-estimated.

(h) The names, titles and post office addresses of the representatives of applicant to whom correspondence in regard to the application may be addressed are: Mark W. Potter, attorney, 100 East 45th Street, New York City; and/or W. S. O'B. Robinson, Jr., General Solicitor, Piedmont and Northern Railway Company, Mercantile Building, Charlotte, North Carolina.

(i) Your applicant was incorporated by legislative charter granted by the legislature of the State of South Carolina on February 24, 1911, with authority to construct and operate and to acquire the stock and physical properties of other companies in South Carolina or in any other state. It was authorized to operate in the State of North Carolina under the general law of that state. At the 1927 session of the legislature of the State of North Carolina, a general law was passed authorizing interurban electric railways, whether organized under the laws of North Carolina or any other state, to engage in business in North Carolina,

and to exercise the power of eminent domain in that state, provided that no such electric interurban railway, when organized under the laws of another state, shall operate its line in North Carolina by steam motive power or as part of a general system of steam transportation. Your applicant operates and proposes to operate under said law.

(j) That the filing of this application was authorized by the Board of Directors of the Piedmont and Northern Rail-[fol. 23] way Company at a meeting held at Greenville, South Carolina, on the 21st day of March, 1927.

(k) The states in which the proposed mileage will be situated are South Carolina and North Carolina. The counties in which the link is to be situated are Spartanburg and Cherokee in South Carolina and Cleveland and Gaston in North Carolina. The counties in which the mileage north from Charlotte will be situated are Mecklenburg, Cabarrus, Davidson and Forsyth. The names of the incorporated cities and villages through which the lines are to pass are as follows: The southern terminus of the link between Spartanburg and Gastonia will be at a point of connection with the present line of the applicant at or near the Union Passenger Station in the City of Spartanburg. The route will then lie in a generally northeasterly direction via Kings Mountain to a connection in the southern part of Gastonia with applicant's present line which operates a street railway service in Gastonia. To handle certain traffic, a belt line will be constructed around Gastonia. Said link will pass through the town of Gaffney, S. C. The southern terminus of the mileage north of Charlotte will be at a point of connection with the present line at a point on the present line where it enters the western portion of the city at or near Summit Avenue. It will run in a northeasterly direction, crossing Trade Street at or near Irwin Creek, passing out of the city limits at a crossing of the Statesville Highway. It will run thence in a generally northeasterly direction from Charlotte to a connection with the street railway lines of the Southern Public Utilities Company at the southern terminus of the lines in Winston-Salem. This extension will pass through Kannapolis and Salisbury and through certain points intermediate between Charlotte and Winston-Salem.

[fol. 24] (l) The total number of miles of main track of the proposed construction is: Spartanburg to Gastonia, approximately 53 miles; Charlotte to Winston-Salem, approximately 75 miles.

(m) Your applicant does not believe a public hearing is necessary in the matter of said application and does not desire such hearing unless such hearing in the opinion of the Commission be necessary or unless subsequently requested by the applicant.

(n) There is attached to this application a map drawn to a scale of an inch to eight miles, defining the route of the proposed line between Spartanburg and Gastonia, indicating the link to be constructed between those points. There are also attached maps indicating the location of two routes between Charlotte and Winston-Salem. At a later date, a map showing the exact location will be provided, if desired. There is also furnished herewith but not incorporated herein tracings of said maps hereinbefore mentioned. At a later date, if desired, the maps accompanying this application will be supplemented so as to define the route of the proposed lines so that they may be definitely described and readily traced; so as to show fully the geographical situation of the proposed lines and their relation to existing railroad lines, and show, so far as limitations permit, other geographical facts pertaining to a consideration of the case.

(o) The applicant submits that the work involved in constructing the mileage hereinbefore referred to is not the construction of a new line of railway or of an extension within the scope and meaning of paragraph 18 of section 1 of the Interstate Commerce Act. It is rather the continuance of work necessary to complete an original unfinished project which was begun prior to the time that the Trans-[fol. 25] portation Act of 1920 went into effect and is not, therefore, subject to the provisions of the paragraph mentioned. The project in mind and planned, of which the presently existing mileage was constructed as a part, involved the completion of the additional mileage described in this application. The map of the property as carried in the Railway Guide as early as 1916 showed the line as projected from Anderson and Greenwood, S. C., on the

south to Durham, N. C., on the north. A terminal and connection at Winston-Salem was secured through the purchase of the street railway in that city in 1913. The construction of the Spartanburg-Gastonia link and the additional mileage north of Charlotte was planned to be done prior to 1920. Surveys were made, construction plans were in progress of formulation, financial plans had been developed, and the present parts of the line were acquired or constructed, but disturbance in world conditions, due to the world war, operated to delay the carrying out of those plans. The idea of completing the project and of doing the work now to be undertaken has never been abandoned. On the contrary the continuation of the work has been a subject of constant consideration in the light of conditions affecting construction costs in relation to the immediate need of the completed facility. Down almost to the present time it has been thought that those conditions suggested that good judgment in carrying the applicant's project to completion required temporarily deferring the work involved in this application. It was for this reason solely that this work originally was suspended and that its resumption and completion has been deferred until the present time. From time to time the directors and officers of the company have considered and discussed the question as to when and how rapidly the work involved in the comple-
[fol. 26] tion of the project should be pressed and carried on. In fact the work involved in the completion of the applicant's project has continuously been going on in the sense that plans have constantly been under consideration and formulation and such steps have been taken from time to time as sound construction procedure seemed to suggest. It is submitted, therefore, that the construction of the mileage now under consideration involves the carrying on and completion of work which was begun prior to the enactment of the Transportation Act, and that such work is not to be considered as subject to the provisions of paragraph 18 of Section 1 of the Interstate Commerce Act.

Your applicant further submits that it is an interurban electric railway, not operated as a part or parts of a general steam railroad system of transportation, and as such is excluded by paragraph 22 of Section 1 of the Interstate Commerce Act from the authority conferred upon the Com-

mission by sections 18 to 21 of that Act. The operations of the applicant have always been carried on in the manner of an interurban electric railway, and as such is not subject to the provisions of paragraphs 18 to 21 of Section 1 of the Interstate Commerce Act. It is advised by its counsel that as now operated it is such an interurban electric railway and that the mileage represented by the additional construction, as well as the existing mileage, will constitute parts of an interurban electric railway property. It is in no respect a part of any steam railroad system of transportation.

The Commission is respectfully requested to segregate and first pass upon the question of jurisdiction involved. The applicant is compelled to urge this procedure by the serious disadvantage the carrier would be under were it necessary to obtain a certificate of public convenience and [fol. 27] necessity or to obtain authority from the Commission for the issuance of its securities.

To present the case as customary on an application for a certificate of public convenience and necessity, would involve much delay and greatly add to the cost of constructing the proposed mileage. The elasticity which is provided for an enterprise by the privilege of keeping the detail of its plans to itself, is of very great practical value. Large expenditure is needed for the purpose of obtaining rights of way and other properties, and the announcement of a definite location will tend unduly to enhance prices demanded. If it is not necessary to determine upon and announce the complete plan for the project before work is begun, it will be possible to do the work at different points from time to time so as to make for the greatest convenience and economy and the lowest possible construction cost. It is important that the work be begun with the least possible delay. The applicant is ready to commence work immediately at several points, if it is not required to obtain a certificate of convenience and necessity. It already has placed large quantities of materials on the ground and incurred expense in large amounts under advice that it was not necessary to obtain a certificate. There is reason to apprehend that important work in the construction of a dam for the storage of water on the Yadkin River, which is now going on and of which neither the applicant nor any allied interest has control, will overflow a large area at applicant's

crossing of the Yadkin River so as to enormously increase the cost of its bridge foundations and other construction work.

It is not possible to set forth as a part of this application all of the facts which in the judgment of the applicant make for a demonstration of the interurban character of [fol. 28] the applicant's present and projected lines. Some of the reasons which seem potent to the applicant and which it is advised are sufficient for the conclusion that it is an interurban electric railway are as follows:

The project of the applicant and its lines is unique. They differ radically from those of the standard railway in conception, in the purpose for which construction, in the function performed and in the service rendered. The road was constructed and has been operated with the thought of making it a contributing factor in the development of North and South Carolina centered in the Piedmont Section.

It is undeniable that the development of the Piedmont Section of North and South Carolina, which includes the territory between Durham and Winston-Salem, North Carolina, on the north, and Anderson and Greenwood, South Carolina, on the south, had become the prime aim and purpose of Mr. James B. Duke during the latter portion of his life and to it he, directly and indirectly, contributed his ability and resources in a most conspicuous and successful manner because of his intense interest in the project and of the project being located in his home territory.

Mr. Duke was born and reared at Durham, N. C., and there began his business career. As all the world knows, this career was tobacco, in the course of which he became the "Tobacco King," so-called, and developed and expanded the business until he made it one of the great industries of this country. In the course of this expansion he formed in 1890 The American Tobacco Company and amassed a tremendous fortune.

While thus engaged in the tobacco business his attention was called to a small water power development on the Ca- [fol. 29] tawba River in South Carolina, and dating from this he became intensely interested in hydro-electric developments. At first his interest was that of a builder of developments, as Mr. Duke was one of those men who live to construct and find their pleasure in so doing. He soon saw, however, that electric power was the key to the

successful development of a community and thereupon his pleasure was found not so much in the building of the development itself as of the building of the community thereby. During all these years Mr. Duke had in his mind using a large part of his fortune for the betterment of mankind and his experience with the water power developments and the impetus they gave to the communities which they served convinced him that here was the proper vehicle and here the proper sphere for the philanthropic purposes that had been growing in his mind and which found their fruition in The Duke Endowment he established in his lifetime and increased by the provisions in his will.

Mr. Duke's hydro-electric enterprise took the form of doing a complete job in this respect. He not only generated electric power for which purpose he created several companies and through them built many developments in the Piedmont Section, but he created a great transmission system known as the Southern Power System, and in addition distributed the power for heat, light and motive purposes through the Southern Public Utilities Company, and through that company acquired and operated street railway systems in such cities as Winston-Salem and Charlotte, N. C., and Greenville and Anderson, S. C.

The Piedmont and Northern Railway Company had its inception as a part of the scheme and enterprise of Mr. Duke which we have outlined above in general terms. Its particular mission was to unite by an electric interurban [fol. 30] service the electric urban railways we have mentioned above. As originally contemplated, it was to extend from Winston-Salem and Durham on the north to Anderson and Greenwood on the south, and when organized the trust indenture was so drafted as that sufficient bonds could be issued for this purpose as and when the plan could be carried out. The portions of the road now built, namely, the portion between Charlotte and Gastonia and the portion between Spartanburg and Anderson and Greenwood, were never intended or expected to be the whole of this road. From the start it was contemplated and Mr. Duke fully expected to fill in the gap between Gastonia and Spartanburg and make the northern extension from Charlotte to Winston-Salem and Durham.

The Piedmont and Northern Railway Company was also an integral part of his scheme for the development of the

Piedmont Section as he contemplated that the interurban service which it rendered would tie up the cities, towns and villages in a transportation system which the steam railroads could not supply and which would greatly tend to their development.

He contemplated a great industrial community, with clearly defined limits both at the north and south. He contemplated furnishing that community with cheap power, with transportation elastic and efficient, with manufacturing enterprises, churches, hospitals, schools and colleges. All of his activities and all of his life work show a steady, determined working to that end. Not only did he carry on work in that territory but he went further and utilized his ability to make money in other activities of almost world-wide scope, with the idea and purpose that the results of his endeavors would be brought back for service in his [fol. 31] chosen Carolina field. His guiding thoughts were of and for a great community composed of many cities, towns and villages tied together in interurban relation and activity. Due largely to his activity, and his leadership and his support, the Piedmont and other sections of those two states have shown a development a parallel for which perhaps cannot be found anywhere else in this country. He and his associates poured millions upon millions of their money into the direct development of that territory. Others, because of what he did were encouraged and enabled to expend many millions of dollars more. The development in cotton mills and industries of varied character that have been attracted by the cheap power and handy, efficient transportation that Mr. Duke provided is phenomenal and unique.

Many thousands were provided with employment in that territory by what Mr. Duke did. He did it nowhere else. He had in mind the inter-relation of all the communities. He designed his traction plan to tie them together and serve them peculiarly as a local interurban enterprise while giving contact with the outside world.

Not only was the development of this area the impelling purpose of his life, but it was a purpose which he provided should be carried on after his death. When the time came for him to stop, he still looked to the future and provided that the bulk of his fortune should be used to carry on his

life purpose to promote the best interests of North and South Carolina. He instructed those who are in charge of the properties of the applicant to carry out the plan that he had devised. The extension of the Piedmont and Northern Railway to Winston-Salem is an essential part of that plan. Having in mind the rendering of the greatest possible public service with his fortune, he left a great endow- [fol. 32] ment to be used to upbuild educational institutions at Greenville, S. C., Davidson, N. C., Smith Institution (an institution for colored people) at Charlotte, N. C., and Trinity College at Durham, now named Duke University, which he contemplated would become among the foremost educational institutions in the United States. Said endowment also provided many millions for assistance to present hospitals and for their increase throughout North and South Carolina.

His power interests were left in such a way as to provide support for the plans he made in the public interest. The income from his properties is to be devoted largely to advancing the interests of the territory which they serve. The Piedmont and Northern Railway Company is to function to that end both with respect to the service which it renders and the rewards for that service.

Mr. Duke's great plan was, as stated in the Duke Endowment, that the revenues of such developments shall minister to the social welfare as the operation of such developments is ministering to the economic welfare of the communities which they serve.

It is submitted that the Piedmont and Northern Railway Company, forming as it does a part of such a plan, may not be regarded as the ordinary transportation enterprise. It was and is a local interurban enterprise, conceived, organized and operated to upbuild the community which it serves. It recognizes that the function of such a utility as it is, is to render public service for fair compensation for service rendered.

Coming to the characteristics of the property as a railway property, attention is called to the following facts: It is operated as admittedly interurban properties customarily are operated. It ties into the street railway systems. Its passenger cars, locomotives and its motor cars are de- [fol. 33] signed to operate where there is a high degree of

curvature, as in cities. It makes frequent stops, averaging 1.2 miles apart, considering always the purpose of rendering the best local service. Its passenger cars are motivated by self-contained motor units, except a few trailers which are attached to cars containing such motor units. The type of construction of the line is that of the standard interurban. Power is furnished by overhead trolley. The rails are bonded for return circuits. Cars and locomotives are so constructed as to operate over curves with a 50-ft. radius, making it possible to make the right-angle city turns.

Passenger cars are lighted in series from the trolley. They are equipped with radial draw bars, enabling them to turn sharp curves and making them unacceptable upon steam lines. Only its box cars and automobile cars are suitable in character for exchange with steam lines. The box and automobile cars are used mainly for local traffic, although from time to time they are exchanged with steam lines.

The personnel is in all respects similar to that to be found on other interurban lines, such as motormen, conductors, electrical workers, electrical repairmen, etc. The personnel is largely recruited from street railway companies and is not selected so as to be qualified to operate a standard railway. Frequent passenger service is maintained over all lines, there being stops at such frequent intervals as are appropriate in urban and interurban service.

The freight traffic is hauled by electric locomotives having various tonnage ratings, designed to serve local conditions, as they vary on different portions of the lines. These locomotives were purchased particularly for use on the lines of this company and are adapted for use only under [fol. 34] the particular circumstances and conditions of traffic prevailing on applicant's property, or some similar interurban electric railway. The electric locomotives while of a size and type that render them available for use on applicant's interurban railway serving a local function, are unfit for a line with long-haul, heavy load traffic.

In the handling and dispatching of trains, there is used a selector system designed for the purpose of use by the dispatcher to throw the semaphore board so that untrained

men will not overlook their orders. Such operating practices are not in use by steam railroads.

The cars and locomotives of the company were specially designed for use under the particular interurban conditions that prevail on the property. A 1500 d. c. voltage is used on the interurban mileage between cities and at certain places in certain cities. The voltage used in the street railway service on the street railway lines in the cities is about 600. There is a switch arrangement provided on all locomotives and cars, so that the voltage coming into the motors is reduced, as the immediate condition requires, from 1500 to 750, which will operate over the 600-volt line. Such practice is followed in Charlotte, Greenville, Anderson and will be followed in Winston-Salem.

The applicant's interurban railway project serves cities in the Piedmont Section in which there are electric street railways operated by Southern Public Utilities Company (a corporation controlled by the same interests which control the applicant). These street railway systems are located in Charlotte and Winston-Salem, North Carolina, and Greenville and Anderson in South Carolina, and over them this applicant has traffic rights. In the City of Gas- [fol. 35] tonia, North Carolina, the applicant itself owns and operates the street railway system. The electric interurban railway of the applicant is the transportation facility by which these cities are connected with each other. The cars and locomotives that handle the traffic of the applicant at and through Charlotte and Gastonia operate over street railway lines of those cities. The cars and locomotives of the applicant in operating over the street railway connections become in effect, where so operated, street railway facilities by virtue of the special design of cars and locomotives and the change of voltage.

Freight traffic is handled in cars that move through the streets of the cities and around curves of a higher degree of curvature than those on which a standard railroad usually operates. The urban operation in cities facilitates the interurban operation between the cities.

The freight traffic of the territory tributary to applicant's lines has steadily increased, mainly because of the increase of industries in the territory served by the applicant's lines. The increase consists chiefly of commodities

brought into the territory for use or produced there and shipped out. The purely overhead traffic amounts to only slightly over 2%. The preponderance of freight traffic, therefore, is directly due to the intensive aspect of the development brought about in these communities tied together and furnished transportation by interurban lines of railway.

It would appear that relatively the passenger traffic has fallen off. This is due very largely to the automobile and to busses. The new mileage which it is proposed to construct, tying together the present northern and southern portions and extending the northern portion to Winston-Salem, will tend greatly to increase its passenger traffic. This will result from the interurban character of the appli- [fol. 36] cant with its frequent stops in connection with its long hauls.

The large volume of freight traffic is represented by concentration of traffic at particular points and over particular mileage. A very large percentage of the mileage does not show such a concentration of traffic or in fact any concentration. On a very important portion of the traffic the haul is short and on a large portion of the lines the traffic density is light.

Except with respect to industry connections, etc., there have been no recent changes in the amount of operated mileage of the applicant. The increase of its traffic has not brought about, or been brought about by, any change in the character of the applicant's property, from an interurban electric railway to a standard railway, such as commonly uses steam power. On the contrary, in the judgment of the applicant, the most important factor contributing to the increase of traffic, is the fact that the property has at all times retained its local, interurban character which has enabled it to render a service that is not possible by the standard railway, while it also provided connections with outside lines. It is because of its particular type of service that the additional operated mileage is urgently needed and will be of special use.

The securities of the Piedmont and Northern Railway Company are regarded by investors, dealers and distributors as securities of an interurban electric railway. In the market they are required to accept that classification

rather than the classification available to a standard railway. Some of the states in listing securities available for saving bank investments go so far officially as to classify the bonds of the applicant as those of an interurban electric railway and deny them the status accorded to bonds of a standard railway.

[fol. 37] The classification of the applicant as an interurban electric railway, as distinguished from a standard railway is made by the officials of the states of North and South Carolina and, as already pointed out, has been emphasized by the statute under which the applicant operates in North Carolina.

Attention is called to the personnel of the Board of Directors of the applicant. Representative of the Piedmont section as a whole, their interest and activity in Piedmont industry and commerce indicate how the applicant's property is managed locally in order best to impartially serve the local interurban community interest. The Directors and some of their affiliations are:

G. G. Allen, Chairman of the Duke Endowment and President of the Southern Power Company. He was associated with Mr. Duke for many years and is one of his executors.

C. C. Armstrong, President of the Armstrong chain of mills at and in the vicinity of Gastonia.

J. W. Arrington, President of Union Bleachery at Greenville, S. C., a large bleaching and finishing plant.

W. E. Beattie, former President of the Parker chain of mills, Greenville, S. C.

L. D. Blake, head of the Belton Mills at Belton, S. C.

C. A. Cannon, President of the Cannon chain of mills, the largest producer of towels in the world.

J. T. Collins, of Philadelphia, Pa.

[fol. 38] B. E. Geer, President of a chain of mills in North and South Carolina and a banker at Greenville. One of the Trustees of the Duke Endowment.

B. B. Gossett, head of mills at Charlotte, N. C., and Anderson, S. C.

J. P. Gossett, President of the Williamston Mills at Williamston and of mills at Anderson, S. C.

E. F. Green, President of Lockwood, Green & Co., of Boston, Mass., head of large mill interests in South Caro-

lina, the majority of which are located along the lines of the Piedmont and Northern Railway.

C. E. Hutchison, head of mills at Mt. Holly, N. C.

J. A. Law, mill owner and banker at Spartanburg, S. C.

W. S. Lee, of Charlotte, N. C., member of Board of Trustees of Duke Endowment, Vice-President and Chief Engineer of the Southern Power Company and President of the Piedmont and Northern Railway.

R. E. Ligon, head of large mill interests at Anderson, S. C.

V. M. Montgomery, President of mills in South Carolina and Georgia.

W. S. Montgomery, President of mills at Spartanburg, S. C., and vicinity.

A. F. McKissick, mill owner, and President of Chamber of Commerce at Greenville, S. C.

[fol. 39] J. C. Self, President of large mill interests at Greenwood, S. C., and adjacent towns.

J. H. Separk, President of a chain of fine yarn mills in the vicinity of Gastonia.

A. W. Smith, President of large mill interests at Greenville, S. C.

E. A. Smyth, formerly president of the Pelzer Mills, now President of a mill in North Carolina at Balfour, and identified with many important industries.

E. Thomason, Vice-President and General Manager of the Piedmont and Northern Railway, Charlotte, N. C.

J. T. Woodside, large mill owner at Greenville and other points in South Carolina.

S. W. Cramer, President of Cramerton Mills, Cramerton, N. C., Joint President of National Council and Member of Board of Government, American Cotton Manufacturers Association.

Piedmont and Northern Railway Company, by Edgar Thomason, Vice-President.

STATE OF NEW YORK,
County of New York, ss:

Edgar Thomason, being duly sworn, deposes and says; that he is an executive officer, to-wit: Vice-President, of the Piedmont and Northern Railway Company, having knowledge of the matters and things set forth in the foregoing application, and that he is duly authorized by said Pied-

[fol. 40] mont and Northern Railway Company to verify and file this application; that affiant has read the foregoing application and knows the contents thereof and that the same is true of his own knowledge.

Edgar Thomason.

Subscribed and sworn to before me this 25th day of March, 1927. Marion E. Treacy, Notary Public, New York Co. N. Y. Co. Clerk's No. 112. N. Y. Co. Register's No. 8036. Commission expires March 30, 1928.

(Here follow maps, side folio pages 40a, 40b and 40c)

[fol. 41] EXHIBIT "B"

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket, No. 6208

In the Matter of the Application of PIEDMONT AND NORTHERN RAILWAY COMPANY Respecting the Completion of Certain Portions of Its Lines and for a Certificate of Public Convenience and Necessity in Connection Therewith if Deemed to be Necessary.

Motion to Dismiss Application

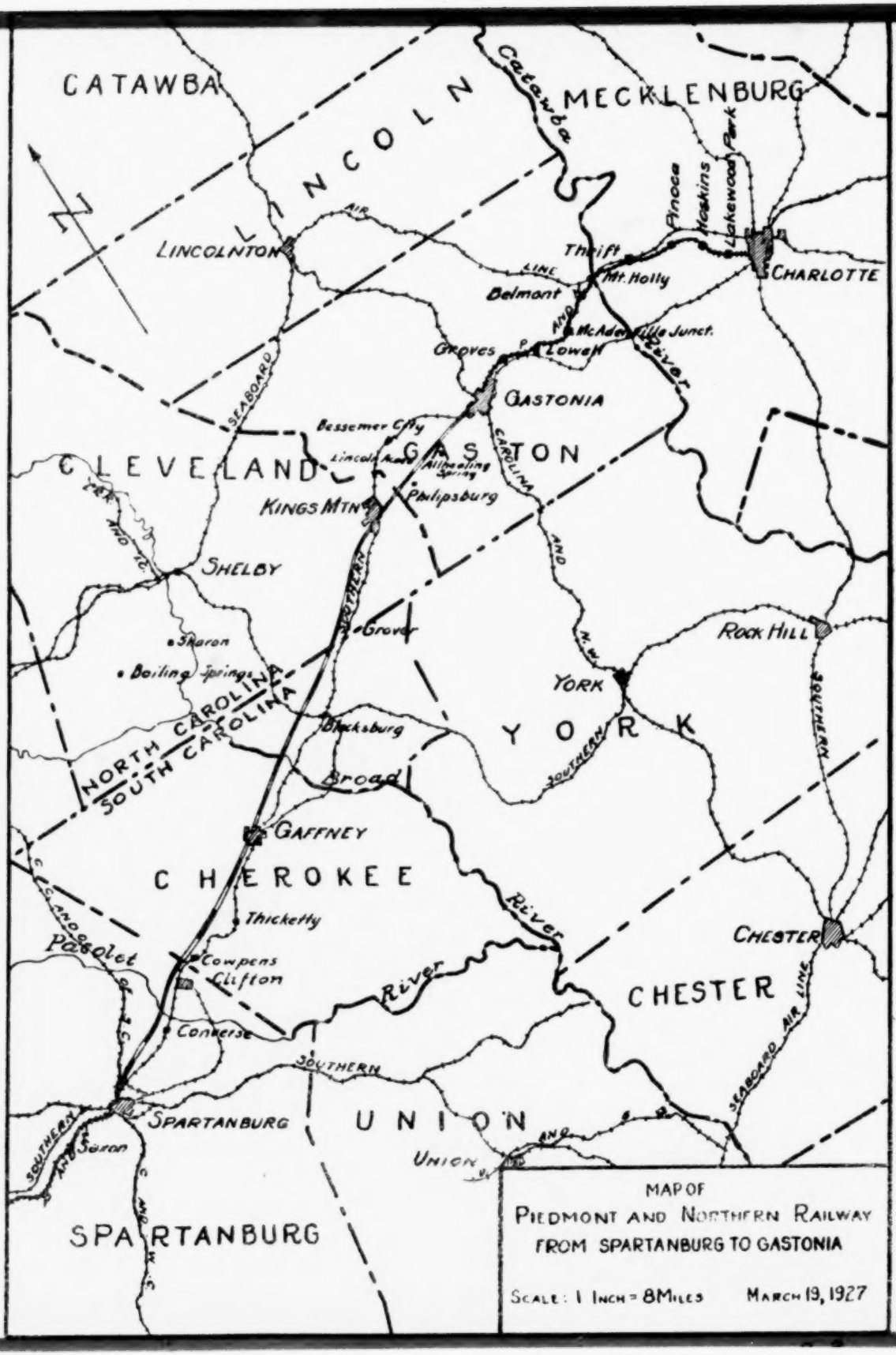
To the Honorable the Interstate Commerce Commission:

Comes now the applicant, Piedmont and Northern Railway Company, and respectfully moves that the above entitled application be dismissed upon the following grounds:

(1) That said applicant and the lines which it proposes to construct or complete are interurban electric railway, within the meaning of paragraph 22 of Section 1, and are not and will not be operated as a part or parts of a general steam railroad system of transportation;

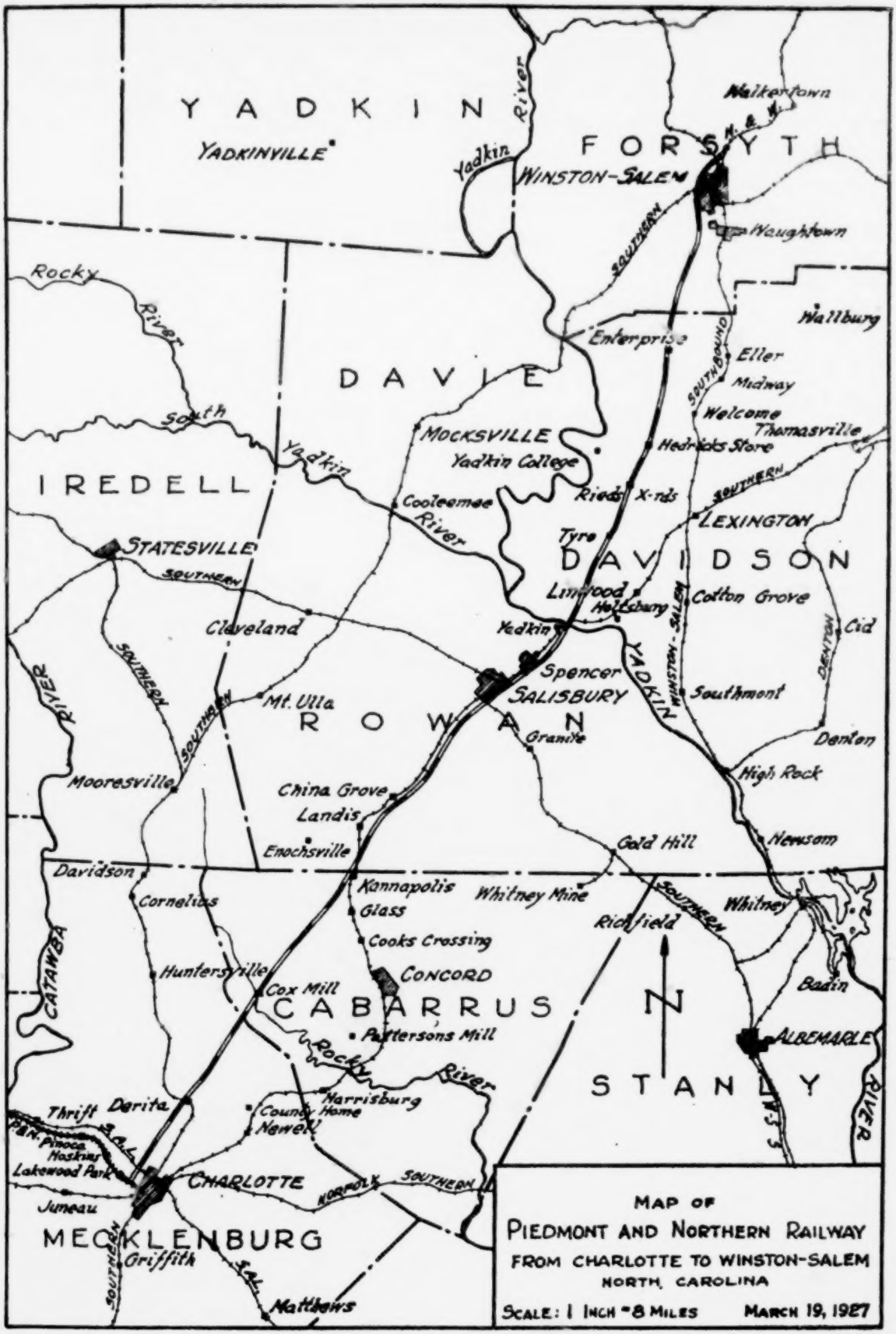
(2) That since the lines now to be completed, as set forth in said application, were partially completed and were

CATAWBA
LINCOLN
MECKLENBURG
Catawba
Pinoca
Hoskins
Lakewood Park
LINCOLNTON
Thrift
Mt. Holly
CHARLOTTE
Belmont
McAdenville Junct.
Groves
Lowell
Beaver
GASTONIA
SEABOARD
Bessemer City
GASTON
CLEVELAND
Philipsburg
KINGS MTN.
SHELBY
CAROLINA

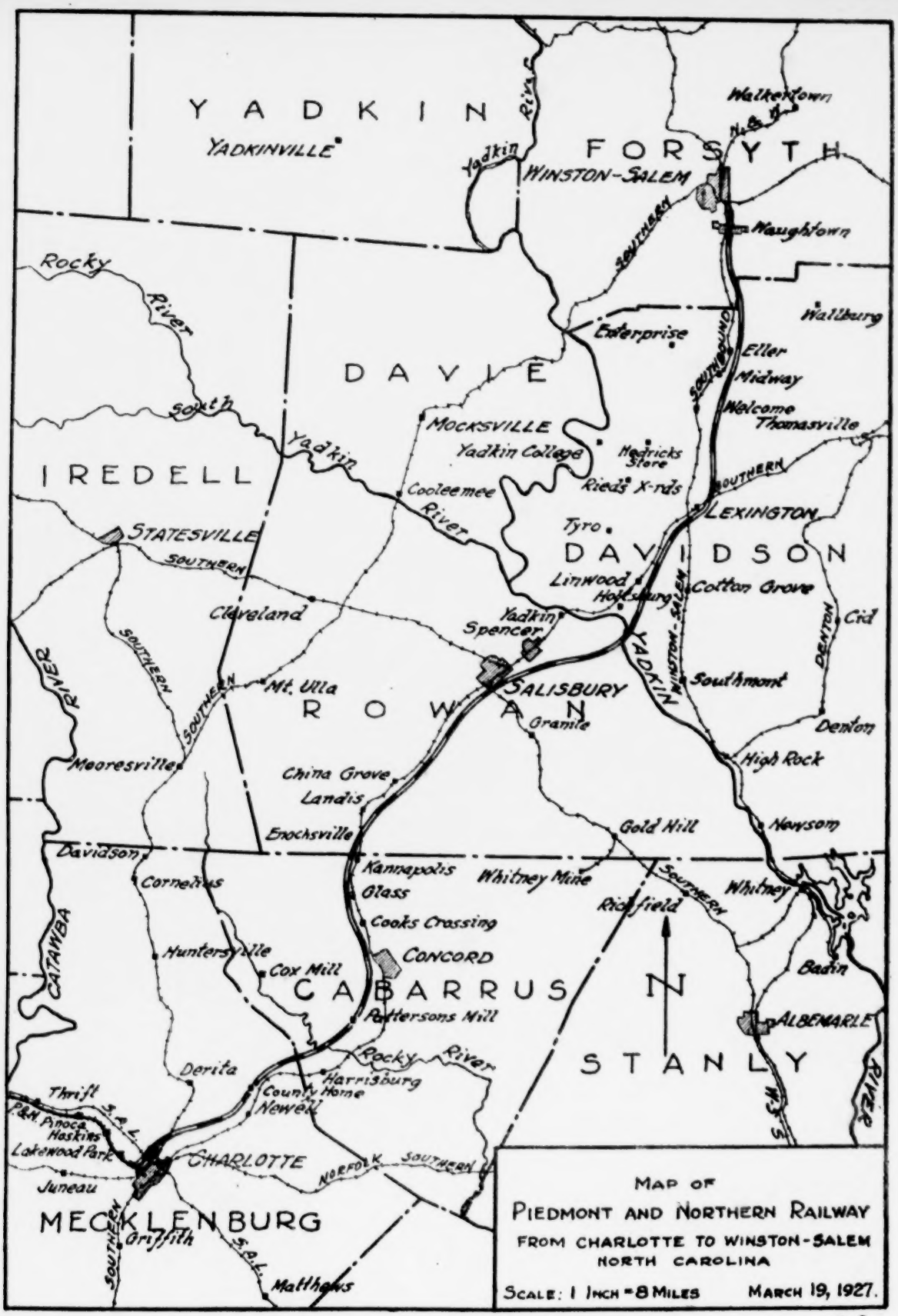


MAP OF
PIEDMONT AND NORTHERN RAILWAY
FROM SPARTANBURG TO GASTONIA

SCALE: 1 INCH = 8 MILES MARCH 19, 1927


YADKIN
YADKINVILLE
Yadkin River
FORSYTH
Walkertown
N. & W.
Yadkin
WINSTON-SALEM
SOUTHERN
Waughtown
Rocky River
DAVIE
Wallburg
Enterprise
Eller
SOUTHBOUND
Midway
South Yadkin
MOCKSVILLE
Yadkin College
Welcome
Thomasville
Hedricks Store
IREDELL
Cooleemee River
Rieds X-rds
SOUTHERN
LEXINGTON
Tyre
STATESVILLE
DAVIDSON
SOUTHERN
Linwood
Holtsburg
Cotton Grove
Cleveland
Yadkin
Cid
YADKIN
WINSTON-SALEM
SOUTHERN
Spencer
SALISBURY
Southmont
Mt. Ulla
ROWAN
Granite
Denton
Mooresville
China Grove
High Rock
Landis
Gold Hill
Newsom
Enochsville
Davidson
Kannapolis
Whitney Mine
Whitney
Cornelius
Glass
Richfield
Cooks Crossing
Huntersville
CONCORD
Cox Mill
Badin
CABARRUS
N
Pattersons Mill
ALBEMARLE
Rocky River
STANLY
Thrift
Darita
Harrisburg
County Home
Newell
P&N
Pinoca
Haskins
Lakewood Park
CHARLOTTE
SOUTHERN
Juneau
MECKLENBURG
Griffith
SAL
Matthews
MAP OF
PIEDMONT AND NORTHERN RAILWAY
FROM CHARLOTTE TO WINSTON-SALEM
NORTH CAROLINA
SCALE: 1 INCH = 8 MILES
MARCH 19, 1927

B-2


YADKIN
YADKINVILLE
Yadkin River
FORSYTH
WINSTON-SALEM
Walkertown
N.&W.
Naughtown
SOUTHERN
Rocky River
DAVIE
Enterprise
Wallburg
Eller
Midway
Welcome
Thomasville
South Yadkin
MOCKSVILLE
Yadkin College
Hendricks Store
Ried's X-rds
IREDELL
Yadkin River
Cooleemee
LEXINGTON
STATESVILLE
Tyro
DAVIDSON
Linwood
Holtsburg
Cotton Grove
Cleveland
Yadkin
Spencer
YADKIN
Cid
DENTON
SALISBURY
Mt. Ulla
ROWAN
Granite
Southmont
Denton
Mooresville
China Grove
Landis
High Rock
Enochsville
Gold Hill
Newsom
Davidson
Kannapolis
Whitney Mine
Whitney
Glass
Richfield
Cornelius
Cooks Crossing
CATAWBA
Huntersville
Cox Mill
CONCORD
Badin
CABARRUS
Pattersons Mill
ALBEMARLE
Rocky River
Derita
Harrisburg
STANLY
Thrift
County Home
Newell
S.A.L.
P.&N.
Pinoca
Haskins
Lakewood Park
CHARLOTTE
NORFOLK SOUTHERN
Juneau
MECKLENBURG
Griffith
Matthews
MAP OF
PIEDMONT AND NORTHERN RAILWAY
FROM CHARLOTTE TO WINSTON-SALEM
NORTH CAROLINA
SCALE: 1 INCH = 8 MILES
MARCH 19, 1927.

B-3

[fol. 42] under construction prior to the effective date of paragraph 18 of Section 1, and are parts of a project that is incomplete without them, such lines are not an "extension" or the "construction of a new line of railroad," within the meaning of said paragraph.

In support of said motion the applicant respectfully refers to the facts stated in said application, heretofore, and on March 26, 1927, filed herein, which application is verified and shows, it is submitted, that the Commission has no jurisdiction over the proposed completion of the applicant's lines.

There is also attached hereto, in support of said motion, the affidavit of W. S. Lee, who is the President of said Piedmont and Northern Railway Company, setting forth in detail the reasons why it is desirable that the Commission pass upon the jurisdictional questions hereby raised before considering the application upon its merits.

Respectfully submitted.

Piedmont and Northern Railway Company, by Mark W. Potter, Attorney, 100 East 45th Street, New York, N. Y.

[fol. 43] EXHIBIT "C"

INTERSTATE COMMERCE COMMISSION

Finance Docket, No. 6208

Proposed Construction of Lines by PIEDMONT AND NORTHERN RAILWAY COMPANY

Submitted December 10, 1927. Decided April 3, 1928

Public convenience and necessity not shown to require the construction by the Piedmont and Northern Railway Company of extensions of its lines of railroad from Spartanburg, S. C., to Gastonia, N. C., and from Charlotte to Winston-Salem, N. C. Application denied.

Charles E. Hughes, Mark W. Potter, W. S. O'B. Robinson, Jr., and Cameron Morrison for applicant.

William G. McAdoo for Georgia & Florida Railroad; Angus W. McLean and Dennis G. Brummitt for State of North Carolina; John G. Richards, Cordie Page, and R. H. McAdams for State and Railroad Commission of South Carolina; L. E. Jeffries, Sidney S. Alderman, F. P. Hobgood, John N. Wilson, Stahle Linn, P. A. Bonham, C. J. Rixey, and L. L. Oliver for Southern Railway Company; James F. Wright, L. R. Varser, and C. R. Capps for Seaboard Air Line Railway Company; F. Barron Grier and Carl H. Davis for Charleston & Western Carolina Railway Company; George B. Elliott and Carl H. Davis for Atlantic Coast Line Railroad Company; William C. Burger for Louisville & Nashville Railroad Company; James J. Mc-[fol. 44] Laughlin for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky; C. F. Haynsworth for city of Greenville, county of Greenville, and Greenville Chamber of Commerce; James F. Byrnes, C. E. Daniels, C. C. Wyche, W. H. Hendley, Ben Hill Brown, and H. A. Ligon for chamber of commerce of Spartanburg, county of Spartanburg, and Spartanburg Transportation Association; Frank Armfield, J. L. Crowell, Jr., and B. W. Blackwelder for city of Concord and Cabarrus County; William T. Ritter for county of Forsyth, city and chamber of commerce of Winston-Salem; George W. Forrester for cotton manufacturers associations of North and South Carolina; W. L. Thornton, Jr., for North Carolina Shippers Association; J. D. Lanford for city and chamber of commerce of Greer; A. E. Woltz for town of McAdensville, Gaston County, city of Gastonia, town of Lowell, town of Belmont, and the Gastonia Chamber of Commerce; Thomas Allen for city, county, and chamber of commerce of Anderson, and towns of Honea Path, Belton, and Williamston; F. M. Gresham for Mecklenburg County; I. M. Bailey and A. J. Maxwell for North Carolina Corporation Commission; W. T. Creighton for Charlotte Shippers' & Manufacturers' Association, and chamber of commerce of Charlotte; Kerr Craige for county of Rowan, city and chamber of commerce of Salisbury, and Salisbury-Spencer Merchants' Association; W. O. Burgin for county of Davidson, city of Lexington, Lexington Retail Merchants' Asso-

ciation, and Lexington Chamber of Commerce; George T. Barnes for city and county of Greenwood and chamber of commerce of Greenwood; V. Paul Rosseau for Charlotte [fol. 45] Merchants' Association; W. H. McGinnis for town and chamber of commerce of Kings Mountain; Butler & Hall for Cherokee County and city and chamber of commerce of Gaffney; R. A. Dobson for town and chamber of commerce of Blacksburg; interveners.

John E. Benton for National Association of Railroad and Utilities Commissioners.

Report of the Commission

By the COMMISSION:

Exceptions were filed to the report proposed by the examiner and the case was argued orally.

The Piedmont & Northern Railway Company, a carrier by railroad subject to the interstate commerce act, on March 26, 1927, filed an application under paragraph (18) of section 1 of the act for a certificate, if deemed to be necessary, that the present and future public convenience and necessity require the construction by it of extensions of its railroad (a) from Spartanburg in a northeasterly direction to Gastonia, approximately 53 miles, in Spartanburg and Cherokee Counties, S. C., and Cleveland and Gaston Counties, N. C.; and (b) from Charlotte in a northeasterly direction to Winston-Salem about 75 miles, in Mecklenburg, Cabarrus, Rowan, Davidson, and Forsyth Counties, N. C. The applicant contends that no authority from us is necessary to authorize it to construct the proposed lines, but asks that we grant a certificate, if we should hold otherwise. On April 9, 1927, the applicant filed a motion to dismiss the application for lack of juris- [fol. 46] diction. This motion was argued before division 4 on April 22. Subsequent to this argument consideration of the motion to dismiss was deferred until there had been a hearing on the merits. Such a hearing was held at Charlotte, N. C., from June 20 to 29, 1927.

The applicant claims that the construction proposed does not come within our jurisdiction because (a) the construction of the proposed lines would merely complete the applicant's railroad, the building of which was begun prior

to the effective date of paragraph (18) of section 1 of the act, has been prosecuted with reasonable diligence under the circumstances, and has never been abandoned; and (b) that the proposed lines will form part of an electric interurban railway, not to be operated as a part or parts of a general steam-railroad system of transportation.

The applicant was incorporated in South Carolina by a special act of the legislature, adopted February 24, 1911, and amended January 27, 1927. The charter grants to the applicant "all the rights, privileges, and franchises given unto railway corporations and street railway corporations under and by virtue of the general statutes of this State and all amendatory and supplemental acts." The applicant is specifically authorized "to construct, maintain, and operate a line or lines of railway, with one or more tracks, to be operated by electricity or other motive power" in and through certain counties in South Carolina and such other counties in the State as may be selected by the corporation, with the right "to purchase, lease, or otherwise acquire the railway and other property, including the rights and franchises, of any other railroad company or street railway company now in existence or hereafter created, in this State or in any other State of the United States" and "to [fol. 47] hold, possess, operate, enjoy, exercise, and dispense of the same." Sundry other powers are specifically granted.

It is urged by the applicant that its existing lines were constructed as a part of a project undertaken several years prior to the effective date of the transportation act to construct a line of railway from Greenwood and Anderson, S. C., to Durham and Winston-Salem, N. C., extending through the principal towns and cities of the Piedmont district of North and South Carolina; that this project, as originally planned, has never been abandoned; and that the work now in contemplation is a necessary part thereof. The section of the line between Charlotte and Gastonia was completed and put in operation in July, 1912; the section from Greenwood to Greenville in November, 1913, and the section from Greenville to Spartanburg in April, 1914. No mileage has since been constructed. Testimony for the applicant is that after the completion of the line between Greenville and Spartanburg further construction was de-

ferred because of financial conditions caused by the World War; that some engineering examinations were made in 1916, but financial conditions prevented further work; that when the road was turned back to its owners at the end of Federal control the property was in bad physical condition and had less traffic than before the war; that it was necessary first to rehabilitate the existing lines and restore the traffic; that the applicant considered proceeding with the construction, but did not consider it prudent to do so because of uncertain financial conditions, high prices, and doubt as to their continuance. It was not until near the end of 1923 that financial conditions were thought to justify proceeding with the work. The applicant then began making further surveys and studies, but claims that it was further delayed for nearly a year by the death of James B. [fol. 48] Duke, the controlling power in the applicant's affairs.

There is much controversy in the record over the applicant's contention that the proposed lines constitute uncompleted portions of a project undertaken prior to the transportation act. On December 2, 1910, the Seaboard Air Line made a traffic contract with the Piedmont Traction Company and the Greenville, Spartanburg & Anderson Railway Company, which were controlled by the so-called Duke interests and were later acquired by the applicant. This contract recited that the two Duke companies proposed to construct, among others, a line from Charlotte, through Greensboro, to Durham, N. C. The contract provides that the Duke companies are not obliged to build any of the proposed lines, nor limited in building others. The Seaboard's representative in the protracted negotiations that led to this agreement testified that a line to Winston-Salem was never mentioned as a part of the plan. The Piedmont Traction Company was incorporated in North Carolina on January 6, 1910, with power to purchase, build, construct, and operate, by electricity or other power, street railways for the transportation of passengers, mail, express, merchandise, or other freight, with the proviso that no street-railway line should extend more than 50 miles from Gastonia. The Greenville, Spartanburg & Anderson Railway Company was afterward merged with the applicant. The

Duke interests bought the street-railway lines at Anderson, Greenville, and Charlotte, and the interurban electric line from Anderson to Belton. By agreement dated January 10, 1911, the same interests formed the Piedmont syndicate. This agreement recites that the parties desire to form a syndicate to construct and otherwise acquire a system or a number of connecting lines of railway in 33 named [fol. 49] counties in North and South Carolina, or some of them, and elsewhere in said States and other States. The named counties cover the general region served by the transmission lines of the Duke Power Company and include the counties in which the applicant now proposes to build, and would also cover a line to Durham. The applicant relies to some extent upon this agreement as showing the intention to build to Winston-Salem and Durham. The testimony for the applicant is that the purpose of the syndicate was to build the railway lines referred to in the agreement; that meetings of business men were held and nearly 1,000 subscriptions taken; that in securing these subscriptions it was explained that the purpose of the syndicate was to build a line of railway from Greenwood to Durham "and various points on or near that line," and that the syndicate was formed as a matter of convenience to acquire certain existing properties. One of the applicant's witnesses, who is a director in the company, testified that he attended two or three meetings of business men at which Duke was present, and that he understood that the road was to be built from Greenwood to Durham; that in 1920 Duke told him that he proposed to complete the line between those points as soon as business conditions justified. The theory now seems to be that Winston-Salem is covered as one of the "various points on or near" the line to Durham. Winston-Salem was a very important city to be so treated if the definite purpose existed to build to that point, but the applicant contends that that purpose is shown by the inclusion of Forsyth County, in which Winston-Salem is located, as one of the 33 counties named in the syndicate agreement, 15 of which are on none of the applicant's lines, built, proposed, or projected. In 1913 the Southern Public Utilities Company, a Duke concern, [fol. 50] bought the street-railway lines at Winston-Salem with the intention, it is testified, that they would be used

to give the railway entrance into the city. Since 1916 the map of the applicant's line, printed in the Official Railway Guide, has shown the railway as projected from Greenwood to Durham, but not to Wniston-Salem. The vice-president of the Seaboard testified that he first heard of the project to build to Winston-Salem in 1924, and that Duke told him then that he was not convinced that it was a good project and was not disposed to build the line if the Seaboard considered such action unfriendly. On July 1, 1914, the applicant executed a mortgage on all its property, present and after acquired, to secure an authorized issue of $50,000,000 of bonds. The mortgage recites that the company wishes to provide funds to pay for existing lines, to construct extensions, branches, and additions, and to acquire additional lines of railroad. It does not define any of the lines to be built or acquired, but the applicant asserts that its amount indicates clearly a corporate intention to build the lines now proposed. This is merely the conclusion of those interested in the applicant's affairs. While the record shows that the construction of a line to Durham was long in contemplation by the promoters of the applicant, it does not warrant the conclusion that they had any definite intention to build to Winston-Salem.

The act incorporating the applicant contains a proviso to the effect that unless the corporation shall enter and begin actual construction of the lines in any county into which it is empowered to enter, either expressly or under the general clause of the act, within 10 years from March 1, 1911, all rights and franchises given to enter that county shall expire. This limitation was removed by an amendment to the statute adopted January 27, 1927. For nearly six years the applicant had no charter power to build a [fol. 51] line from Spartanburg to Gastonia. While the principle is settled that no one but the State can question the failure of a corporation to comply with a limitation in its charter, nevertheless the fact that the charter was permitted to lapse for six years is of evidentiary value on the claimed continuity of intention so vigorously pressed by the applicant.

Maps submitted with the application showed two divergent alternate routes between Charlotte and Winston-Salem, and it was not until a few days prior to the hearing

that the applicant made its election of the route it proposed to follow. Efforts were made by the applicant to secure trackage rights over the Winston-Salem Southbound, hereinafter called the Southbound, between Lexington, N. C., and Winston-Salem, with or without a stock interest in the owning company. These negotiations were opened August 28, 1925, and ended in failure on February 18, 1927.

A corporation can act only through its directors, or its officers and agents, acting under authority of the board. Whatever intent may have existed in the minds of the applicant's promoters with respect to the proposed construction was not translated into corporate action until November 3, 1926, when a resolution was adopted by the applicant's board of directors calling a meeting of the stockholders for the purpose of authorizing the directors to construct the proposed lines. Such stockholders' meeting was held on December 8, 1926, and the necessary authority was granted.

We have held that a certificate of public convenience and necessity is not required where construction of a line was begun in good faith prior to the effective date of paragraph (18) of section 1 of the act and was thereafter diligently prosecuted to completion. Public Convenience Application [fol. 52] of T., O. & E. R. R., 67 I. C. C., 484. Public Convenience Application of U. & N. Ry. 67 I. C. C. 554. The facts do not bring the present case within the principle announced in the cases cited.

The second jurisdictional point made raises the question as to whether the applicant's lines constitute an electric interurban railway, not operated as a part or parts of a general steam-railroad system of transportation, within the meaning of the exemption contained in paragraph (22) of section 1 of the act.

One of the applicant's lines extends from Greenwood northerly to Spartanburg, S. C., 89.9 miles, with a branch from Belton to Anderson, 11.3 miles. The North Carolina segment extends from Gastonia easterly to Charlotte, 23.5 miles, with a branch to Belmont, 3.2 miles. The total mileage is 127.9 miles. The road is of standard gauge, well built according to the standards of steam-railway construction, and is operated by electric power transmitted by trolley. Between terminals it is located on private right of way. It traverses a rather hilly country, largely at right

angles to the drainage, closely paralleling lines of the Southern Railway. The maximum grade 1 per cent compensated for curvature, is about the same as on the Southern's double-track main line and was obtained at the expense of rather heavy construction. The bridges are designed for the same loading as those on the Southern. The line connects the street-railway systems of the cities it reaches and performs an ordinary interurban passenger service, with stopping points averaging 1.2 miles apart. It also performs all of the essential functions of a steam railroad in competition with the Southern and the other steam lines serving the territory, and now derives about 92 per cent of its revenue from freight. Freight revenues [fol. 53] have steadily increased since 1913, but passenger revenues have declined heavily since 1918 and are now less than in 1913. In 1926 operating revenues were $2,517,362, of which $2,288,092 were from freight, $138,540 from passengers, $40,337 from mail and express and $50,393 from other sources. Of 72,886 loaded cars handled, 68,370 cars were interchanged with steam railroads, most of these in interstate movement reaching all over the United States. The mean distance between scheduled stops for freight trains is about 2.8 miles both on the applicant's line and on the corresponding mileage of the Southern. The passenger cars are generally self-contained motor units of the usual interurban type. Freight trains are hauled by locomotives weighing from 55 to 95 tons each, rated to haul from 800 to 1,200 tons. Occasionally, perhaps not infrequently, trains of 45 cars or more are hauled, using two locomotives, but the average train is 20 cars. Only 2.9 miles of the main-line mileage is in streets, and but little freight is handled through streets, except that the street railways in the cities serve to collect and distribute freight locally, providing a facility that is urged as one of the special advantages of the service over that performed by steam roads. The applicant owns and operates the street railway system at Gastonia, while the systems at Charlotte, Greenville, and Anderson are owned and operated by the Southern Public Utilities Company, which is controlled by the same interests that control the applicant. The lines now proposed would connect with local street railways also owned by the Southern Public Utilities Company, but would provide independent through tracks to move freight traffic

around the cities. Most of the applicant's freight traffic is handled in cars owned by steam railroads, but the applicant owns 165 automobile cars and 99 other box cars, [fol. 54] all of which are of ordinary steam-railway type and move freely on foreign roads.

The applicant formerly maintained a regular Pullman schedule in connection with the Seaboard Air Line. It has an extensive traffic organization for a road of its size. It is a party to the tariffs of the steam roads and to the uniform express contract of the American Railway Express Company. It is a member of the American Railway Association, the Southern Freight Association, and other traffic organizations of the steam roads. It is represented by powers of attorney in nearly every traffic bureau of the United States, and has 502 published tariffs. In 1926 it initiated 42 changes of rates to distant points. It follows the methods of the steam roads in matters of rate divisions, interline billing, and in all relations with shippers and consignees. Its traffic manager testified that it performs all of the characteristic service of an interurban railroad and equals the service of the standard railroads in other respects—that it is an interurban railroad "and plus." Further testimony for the applicant is that its operating methods are like those of other interurban electric lines and that its operating personnel is drawn largely from street railways; that its service is different from that of the steam roads in that it is more elastic and approaches in nature a switching service over its whole line, because its freight trains are run in small units, which permits rapid switching; that freight trains are run more frequently, make more stops, and set out and pick up cars all over the line. It is also testified that we have never treated the applicant as subject to the valuation act; that the applicant is governed by our accounting rules for electric railroad; that on October 12, 1920, we made an informal ruling that the applicant was not subject to the provisions of the transportation act relating to the issue of [fol. 55] securities; and that the Railroad Labor Board ruled that the applicant's line was an electric interurban railroad, not operated as a part of a steam-railroad system. Any informal ruling made by us to the effect that the applicant was not subject to section 20a of the act was based

wholly upon representations made by the applicant and not upon a hearing or other investigation.

It appears from the record that the lines were built primarily for freight traffic. The construction is admittedly that of a standard steam railway, except in respect to power transmission. Testimony for the applicant is that when the road was built it was much better than the Southern's main line.

All of the opposing witnesses testified that there is no important difference between the applicant and the steam roads in the matter of freight transportation, except the use of electric power. In November, 1920, the then president of the applicant, appearing before us in Docket No. 11774, South Carolina Fares and Charges, stated that "the Piedmont & Northern Railway Company is an electrically operated railroad in that it employs electric locomotives instead of steam locomotives, and that is the only distinction between it and the steam roads." Except for the relatively unimportant passenger traffic, the functions of the applicant's line and its methods of operation do not differ materially from those of a steam road in any essential particular except in the use of electric power. The present contention of the applicant appears to be that if a railway operated by electricity performs the characteristic service of an electric interurban line it may perform in any measure all of the functions of a steam railway without coming under the provisions of paragraph (18) of section 1 of the act, unless it is operated as a part of a general steam-railroad system. All of the evidence shows that passenger traffic would be of relatively very small importance, and [fol. 56] that the line would be designed primarily to carry freight. The applican's line, as proposed to be extended, would connect with the Norfolk & Western and Southern at Winston-Salem and with the Georgia & Florida Railroad at Greenwood. One of the purposes for the proposed construction is to form a new through route for the movement of freight between the North, East, and West, and Florida points. The appplicant estimates that the proposed construction will enable it to add to its present traffic over 82,000 carloads of freight in the first year of operation, of which over 12,000 carloads would be bridge traffic.

In Kirkpatrick v. Piedmont Traction Co., 170 N. C. 477, 87 S. E. Rep. 232, the Supreme Court of North Carolina, in

discussing the railroad of the Piedmont Traction Company, which now forms the applicant's line between Gastonia and Charlotte, said:

The defendant operates a street car line of the city of Gastonia. The defendant also operates freight trains and interurban passenger trains over this avenue in front of plaintiff's house. The defendant's line of railroad runs from Gastonia to Charlotte, N. C. Its interurban passenger cars and trains carry passengers between these two points and intermediate points. Its freight trains likewise handle freight between these two points and intermediate points, and in addition it transfers its freight cars to the Seaboard Railway, the Southern Railroad and the Carolina and Northwestern, and these roads in turn transfer cars from their lines, loaded with freight, to the defendant's lines. It is a regular standard-gauge railway, using elec- [fol. 57] tricity as a motive power instead of steam. * * * We are of opinion that from the nature and description of the defendant's business, as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a "steam railway" and cannot be regarded as the ordinary street railway. The matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it. * * *

The statutes of South Carolina provide that—

The phrases "Interurban Railroad" or "Interurban Railway" shall be construed to include all railroads and railways operated by electricity whose main business consists in the transportation of passengers from one municipality to another. [Code of Laws of South Carolina, 1922, Vol. 3, p. 1528.]

It appears clearly that the applicant's railroad, as proposed to be extended, would be a commercial railroad operated by electricity and not an electric interurban line within the meaning of paragraph (22) of section 1. We are of opinion that we have jurisdiction of the application.

The application has the support of the governors and utility commissions of the two States, of various municipal, civil, and trade organizations, and of many individual shippers. No opposition is voiced except by the carriers

now serving the territory. The Southern Railway Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway Company, the Carolina, Clinch-
[fol. 58] field & Ohio Railway, the Louisville & Nashville Railroad Company, and the Charleston & Western Caroline Railway Company intervened in oppostion. These carriers, in the order named, will be referred to hereafter as the Southern, the Coast Line, the Seaboard, the Clinchfield, the L. & N., and the C. & W. C. The applicant's railroad will be sometimes designated as the P. & N. The Georgia & Florida Railroad, hereafter called the G. & F., whose extension to Greenwood will form the southern part of the new through route which it is proposed to establish, intervened in support of the application.

The existing lines of the applicant closely parallel lines of the Southern. From Greenwood to Spartanburg the average distance between the two is about 0.5 mile; from Greenville to Greenwood about 0.13 mile, with four crossings; from Belton to Anderson about 0.4 mile. In all these cases the routes are almost identical. From Charlotte to Gastonia the average distance apart is about 2.6 miles, the maximum about 4.7 miles. This segment of the applicant's line also parallels the Seaboard closely from Charlotte to Mount Holly. The proposed line from Gastonia to Spartanburg would parallel the Southern at an average distance of about 1.1 miles, the maximum distance from any station being 3.5 miles. The proposed line from Charlotte to Winston-Salem parallels generally the Southern's main line from Charlotte to Lexington, about 51 miles. From Charlotte to Kannapolis, 23 miles, its general course is nearly straight and its maximum distance from the Southern's main line is about 8 miles, average distance 3.8 miles. For the next 22 miles northward its route lies generally within less than 0.5 mile of the Southern's main line, passing through Salisbury and Spencer; then it diverges to a point about 4 miles westerly from Lexington, the junction
[fol. 59] point of the Southern and the Southbound. From this point to Winston-Salem it nearly parallels the Southbound, at an average distance of 2.6 miles therefrom. Its average distance from the route formed by combining the Southern and the Southbound is about 2.4 miles. The Southern has a single-track line from Charlotte to Winston-

Salem, which passes through Mooresville and Mocksville. The proposed route is from 0 to 13 miles easterly from this line, the average distance being about 8 miles. Only about 6.5 miles of the proposed Charlotte-Winston-Salem line is more than 4 miles from some railroad. All of the distances from other railroads, stated above, are straight-line distances.

The applicant urges that the proposed lines are needed to add to and supplement the service of the steam railways at the points they would serve locally in common; to provide competitive railway service in the territory to be traversed; to bring rail transportation closer to parts of the territory; to provide additional sites for industrial plants; to create new through routes; to promote the further industrial development of the Piedmont section of the Carolinas by means of the above-described service; and to better assure the value of the investment in its existing lines.

It is further urged that connecting the applicant's two lines would increase their usefulness to the communities they now serve; that all of the communities most affected strongly favor the construction of both lines, as is shown by numerous interventions and all of the testimony of local witnesses; that the lines would be operated in connection with all of the existing railways and, creating much new traffic, would divert only an insignificant amount from any [fol. 60] of them; that the prospective earning power of the lines is admitted to be sufficient and that the applicant is able to finance their construction.

The protestants contend that the existing railroads provide good and sufficient service and have a present capacity much in excess of the needs of the region; that the proposed lines would provide an unnecessary transportation service, not materially different from that of existing lines, which would injure them by diverting their traffic, being aided therein by the applicant's association with the powerful Duke interests. They urge further that this connection involves a violation of the commodities clause of the act.

There is testimony of a general nature that the industrial development of the upper Carolinas, in the Piedmont section, will require additional transportation facilities, and that the applicant's railway, as proposed to be extended, would meet this need. Statistics of the past growth of in-

dustry and population are given to show the great industrial development that has taken place, especially since 1910. The applicant claims that this growth has been due in large part to the service of its railroad, and that an extension of this service as proposed is necessary to promote the further development of industry. The applicant's traffic manager testified that the great growth of the textile industry in the territory served by the applicant was due to the construction of its railroad, and that 33 of the 63 textile mills built in this territory since 1910 are served exclusively by the P. & N. The testimony for the protestants is that the applicant's railroad was built where the industry was already most developed, and this is true in part, at least. Testimony for the Southern shows that in the period 1912-1926 the textile industry on its lines has grown more at noncompetitive than at competitive points.

[fol. 61] The greatest growth of the textile industry, so far as shown, has been along the main line of the Southern or very near to it. Between Greenwood and Greenville the increase appears to have been relatively small despite the service of two railroads. In the entire distance from Greenwood to Spartanburg, 93 miles by the Southern, the gain in spindles has been less than in the Southern's local territory from Concord to Burlington, N. C., 94 miles. No figures are available in the record for comparing items other than spindles.

General testimony was offered to the effect that the proposed lines are necessary to take care of the expanding textile interests; that the country between Spartanburg and Winston-Salem is developing very fast industrially, and that its agriculture is more diversified than in other parts of the South; that the increasing tendency to move industry from congested centers of the North will lead to an even more rapid development in the next eight or ten years, which will cause a parallel progress in agriculture and other pursuits; and that the only thing that could retard this growth would be inadequate transportation. The president of the Winston-Salem Chamber of Commerce testified that that city is now served by three railroad systems, but does not get the type of service that the proposed line would give; that in view of the applicant's "flexible" service it would be especially fitted to supply new industrial

sites which are much needed for small industries; that Winston-Salem is served by the Norfolk & Western, hereafter called the N. & W., the Southbound, and three lines of the Southern, but that it was the view of the chamber of commerce that the more railroads the better. It is claimed that additional railroads in the Piedmont section would enable cotton manufacturers to get goods to finishing plants quicker, and that the more railroads there are the more [fol. 62] finishing plants will be attracted to the region.

There is no substantial evidence of a more direct nature to show that the traffic capacity of the existing railways is insufficient or will become so soon, but the applicant contends that the bridge traffic on the Southern's main line is so heavy that the Southern is even now unable to move less-than-carload freight expeditiously between local points in the Piedmont section. All of its other service is admitted to be good. As to movement from Charlotte to Winston-Salem there is no attempt to show that the Southern's single-track line via Mooresville is, or is soon likely to be, taxed by the traffic. No inherent limitations of this line are shown. It is 83 miles long, 11 miles longer than the proposed route. The Southern also moves traffic between Charlotte and Winston-Salem via Greensboro, a distance of 122 miles. Witness Green, assistant to the president of the Southern, testified that the density of revenue is greater on the Southern's line between Greenville and Salisbury than on any other part of the system but not greater than on parts of other railways in the South, and that the density of traffic is much less than on other parts of the Southern. He further testified that the facilities of the Southern have always been expanded to keep ahead of immediate needs, and are vastly so now; that with slight additions to terminal facilities its double-track line could probably handle three times its present traffic; and that between Greenville and Greensboro it could certainly handle double the present business without additional facilities. The general superintendent of the district testified that the Southern is in position to handle well three times the present traffic on its lines in the Piedmont section. The traffic density of the Southern's main line between Greenville and Salisbury in [fol. 63] 1926 was about 2,600,000 ton-miles per mile; that is about one-half as great as between Salisbury and Greens-

boro and four-sevenths as great as between Greensboro and Monroe, Va. It is less than on some single-track lines of the system, which probably derive a greater proportion of their tonnage from coal and other low-grade commodities. It is shown that on certain parts of its line the Baltimore & Ohio hauls on a double track from 9 to 10 million ton-miles per mile, under conditions considered fairly comparable with those on the Southern's main line. Train density is probably a better gauge of the proportion of potential capacity used. In March, 1927, the average number of trains, in both directions, was from 27.5 to 31 a day for different segments of the line between Greenville and Salisbury, from 37 to 42 between Salisbury and Lynchburg, Va., and from 55 to 65 on segments between Orange, Va., and Washington, D. C. It is apparent that the train movement between Greenville and Salisbury is small in proportion to the capacity of the double-track line. The number of freight trains is much smaller than on some of the Southern's single-track lines. The potential capacity of the Southern's line between Washington and Atlanta, Ga., is estimated at about 144 trains a day. In 1926 the traffic density of the Southern's more direct line between Charlotte and Winston-Salem was about 1,160,000 ton-miles per mile between Charlotte and Mooresville and about one-half as much north of Mooresville. In March, 1927, the average number of trains daily was 13.6 on the first of these segments and 9.8 on most of the second. The record does not show the physical characteristics of this line, but it appears probable that a single main track on this route could carry three times the present traffic if provided with a reasonable number of sidings and other appurtenances. [fol. 64] That the Southern has pursued a liberal policy which has done much to promote the industrial growth of the Piedmont section, and that its service is good, except in certain claimed deficiencies in the local movement of less-than-carload freight, is sufficiently shown by the applicant's witnesses, considering their testimony as a whole. The testimony for the Southern is that its through-freight movement does not interfere with the handling of its local freight, and the record indicates that no serious interference should be necessary. The total number of freight trains in both directions averaged from 9.6 to 12.8 a day in

March, 1927, upon different segments of the line between Greenville and Salisbury.

An owner of cotton mills located at various points on the Southern testified that the development of the textile industry is apt to be along the lines of finishing plants to which the present mills would furnish material, and that quick service is of the greatest importance in handling shipments to these plants. Another cotton manufacturer says that one of the problems of the manufacturers is finishing their goods; that if they had other rail lines they could get goods to finishing plants more quickly and would be better able to compete with New England mills, which are located very close to finishing plants; and that the more railroads they have the more finishing plants will come to their territory. The claimed urgency of this problem does not appear to have prevented the industry in this region from growing much faster than that of New England. The establishment of finishing plants in the South has begun very recently. It is testified that the object of moving finishing plants to the South is to put them closer to the products they treat, and that time is more important than freight rates in that connection.

[fol. 65] Considerable testimony was offered with respect to delays in the movement of local less-than-carload freight by the Southern, particularly in the territory between Greenville and Greensboro. Various witnesses testified to such delays, the instances referred to being taken at random. They show some very slow less-than-carload movement by the Southern and some much faster by the applicant's line. The general manager of a yarn-dyeing plant at Greenville testified that time was of first importance in his work because goods are now marketed on a quick turnover, orders being very small as compared with those of 10 years ago. The testimony for the Southern is that the hand-to-mouth buying that has become common has been made possible largely by its own improved service. The traffic manager of the Spartanburg Transportation Association testified that the applicant has closer contact with shippers than the Southern and that its service is more satisfactory for short hauls. One of the applicant's directors, who is interested in six cotton mills at Gastonia, three of which are served exclusively by the Southern and one of its subsidiaries, testi-

fied that the Southern had given excellent service in his section since the applicant's line came there. Another of the applicant's directors stated that the service given by the Southern to the Piedmont section had been good as a whole, but not so good as that of the applicant. A wholesale druggist and banker at Charlotte testified that so far as his experience is concerned the Southern gives thoroughly satisfactory service for incoming freight from the North and for all outbound freight except to points between Charlotte and Greensboro; that there have been serious delays in delivering less-than-carload freight to that he has had to ship to these points by truck or express Salisbury, High Point, and Lexington, in particular; and when time was important. [fol. 66] He claims that the rail service has been slow for 25 years, but says that it has improved very lately. He admits that the Southern is a fine railway, that it has contributed substantially to the remarkable development of the region, and that its service has improved as its revenues increased. Lexington is nearer to Greensboro and Winston-Salem than to Charlotte. No matter how much rail lines may be multiplied, it is probable that within certain ranges movement by truck will be quicker and will be resorted to in the competition of rival distributing centers. The use of trucks has increased lately notwithstanding some concurrent improvement in railway service. The construction of hard-surfaced highways in North Carolina has facilitated trucking, which has come into general use in competition with railroads for hauls up to 50 miles.

The chairman of the transportation council of the Winston-Salem Chamber of Commerce, a witness for the applicant, testified that the service of the Southern is generally fine, and that on local shipments passing through junction points it is generally, but not always, satisfactory. Another witness from Winston-Salem expressed the view that the applicant's proposed line could move freight between Winston-Salem and Gastonia and Greenville in from 24 to 48 hours, and that this shows the need for the construction proposed. The secretary of a hardware jobbing house at Winston-Salem testified to delays in shipments to Charlotte, Gastonia, and other North Carolina points south of Salisbury, and expressed the opinion that the construction of the new line from Charlotte to Winston-Salem would eliminate these delays. If Winston-Salem now competes with

Charlotte to the extent of shipping hardware into and through that city, it would not appear that it had been put [fol. 67] to much disadvantage because of the lack of additional rail lines between these points. Notwithstanding all of the testimony of the applicant's witnesses with respect to the local movement of less-than-carload freight, the freight-traffic manager of the Southern testified that he had not heard any complaints prior to the hearing in this proceeding. If delays of the character testified to by the applicant's witnesses occur, for which the carrier is responsible, administrative remedies for their correction are available.

Freight traffic of the territory served and proposed to be served by the applicant consists of coal, raw materials, supplies, and miscellaneous traffic inbound, and textile and other manufactured products outbound. The outbound movement consists largely of less-than-carload traffic for distant destinations. The local less-than-carload traffic is said to be less than 1 per cent of the total. Except in a few instances, the mills are served by private sidings, and the Southern's freight-traffic manager was of opinion that more than 99 per cent of all parcel freight handled by the Southern and the applicant from cotton mills is loaded on cars placed on these sidings. The practice of the mills is to load from their own platforms all the outbound freight they have at the time of loading, provided it amounts to 10,000 pounds or more. In some cases the cars are so loaded that they can be moved directly, without breaking bulk, to specified destinations, or to distant break-bulk or transfer points, or to ports for transfer to steamers. In other cases they contain shipments for many destinations, so that they must be taken to a transfer point. To expedite freight movement the Southern has established two major transfer facilities, viz.: Spencer Transfer, near Salisbury; and John Sevier Transfer, near Knoxville, Tenn. There are auxiliary transfers at Columbia, S. C., Hayne (near Spartanburg), Atlanta, [fol. 68] Ga., Cincinnati, Ohio, and elsewhere. Spencer Transfer comprises a yard with warehouse and platform capacity to handle 250 carloads of freight at one time. Less-than-carload freight to and from the Piedmont section is there assembled and loaded according to destination, and dispatched in solid carloads to be moved without breaking bulk either to final destination of the shipments,

or as far as possible toward it. The number of destinations for which carloads can be made up depends on the volume of traffic. According to the car roster now in use, cars are placed daily for 172 different destinations or break-bulk points, and more cars are supplied when needed. Cars to distant points are not run with less than about 10,000 pounds load, but cars are loaded with as little as 3,000 or 4,000 pounds to points in the local territory. The Southern reaches by its own lines every important city south of the Ohio and Potomac Rivers, except Roanoke, Va., Wilmington, N. C., and Nashville, Tenn. Cars are provided to a number of gateways of the Southern's system, and to many points beyond, including Baltimore, Philadelphia, New York, Boston, Wilkes-Barre, Harrisburg, Pittsburgh, Buffalo, Detroit, Chicago, Kansas City, Houston, Key West, and others. Cars are also provided to a large number of points in the Carolinas, Virginia, and Georgia. Solid cars of merchandise from all over the country, destined to points in the Piedmont section, are broken up at Spencer Transfer for distribution. Peddler cars are made up daily, except Sunday, for each of the freight districts on the Southern's lines in the Piedmont section, and these cars are handled in through trains except in the district for which they are made up. Twenty-eight scheduled freight trains are operated out of Spencer Transfer daily, and there is one local freight train each way over each freight district. More [fol. 69] have been run when necessary. Shippers in the Piedmont section often load a car solid with goods for various destinations and route it through Spencer Transfer.

Spencer Transfer was established in 1907. John Sevier Transfer was opened about two years ago to expedite the movement of the increasing volume of traffic to the West. On a representative day, May 31, 1927, Spencer Transfer loaded 256 cars to destinations in 17 States. The average distance traveled by these cars was 264.5 miles, and their average time to destination two days. Spencer, John Sevier, and Hayne Transfers together loaded 424 cars. The testimony for the Southern is that its extensive package-car freight service, operated by means of this system of transfers and fast-scheduled through-freight trains, gives shippers the advantage of quicker time and avoids the damage that would otherwise occur in transferring less-than-carload

freight at junction points; that this improved service, together with the liberal rate policy pursued by the Southern to promote industry on its lines, has enabled the textile and furniture manufacturers of the Piedmont section to build up their trade in competition with New England and Grand Rapids, Mich., and has contributed much to the general progress of the region; that this service is possible only because of the Southern's extensive mileage and facilities and the amount of traffic available, and would necessarily be restricted and impaired if the volume of traffic were reduced substantially, because it would then be impossible to make up package cars for so many destinations. The applicant tries to show that the system of transfer has sacrificed the speed of local less-than-carload shipments in the Piedmont section and there was some testimony to this general effect. The Southern's witnesses deny that the movement of its [fol. 70] local freight is delayed in general by the operation of the transfers, but admit such delays have occurred in some instances through faulty methods in loading which the company is striving to correct. Their testimony is that the use of Spencer Transfer for local shipments between points in nearby territory is a limited and secondary use which is not encouraged by the Southern; that it is usually quicker to send such shipments direct; and that when they are so handled the service is quick and has not given rise to complaints. Sometimes a mill puts into a full car all of the shipments it has for the day without respect to destination. The car so loaded must be taken to Spencer of some other transfer point, and some of its contents may require a back haul. Shipments to finishing plants are sometimes delayed in this way. Most of the less-than-carload freight handled by the Southern in the Piedmont section is carried to Spencer Transfer. An executive officer of the Southern testified that the company has as complete a system as he can conceive of to collect and distribute the traffic of the Piedmont section, and that it gives as good service at noncompetitive as at competitive points, as this is necessary to permit competition with New England. He describes the competitive rates the company has made in pursuance of a policy to build up industry on its lines. When the company was organized in 1894 there were but few industries on its lines. It made very low rates on cotton to the mills, and made rates on cotton goods from the mills to New York and New

England lower than the rates on cotton to the same destinations. It made rates on furniture to allow competition, first with the makers of cheap furniture in the East, and later with Grand Rapids, so that furniture from North Carolina is now sold in the territory near Grand Rapids. The freight-traffic manager of the Southern testified that the [fol. 71] applicant handles freight traffic just as the steam railroads do, and that its haul is so short that it could not affect materially the service in long-haul traffic.

Among other reasons, the applicant claims that the proposed extensions are necessary because of the peculiar nature of the service they can render, which differs from that of steam railways. Most of the testimony on this point concerns the movement of freight. Testimony for the applicant is that its freight service is more elastic and flexible than that of steam railways. The president of the applicant testified that the Piedmont section needs a very flexible railroad service because its industrial development is scattered; that the few stops made by the steam lines congest industries into cities; that industries are unable to pay the high cost of land; and that there is an active demand for new industrial sites. He says that the ability of an electric line to operate over sharper curves and steeper grades gives it an advantage in reaching industries and business establishments, and that the applicant has given local jobbers quicker and better service than they formerly had. On behalf of the protestants it is testified that dummy steam engines can be run over any curves that standard freight cars will pass over and that such engines are used in several cities by some of the protesting carriers. It is claimed that closing the gap between the applicant's two lines would improve their service. This would appear to apply chiefly to local movement between points on the two segments.

Witnesses for the protesting railroads deny that the applicant's freight service differs materially from that of the steam roads, and witnesses for the Southern say it is not more flexible than that of their road. The Southern contends that the growth of industry on its line at noncompetitive points indicates that its service is good and not [fol. 72] inferior to that of the applicant. It is admitted that the applicant has a more frequent local freight service.

Another advantage claimed is that freight-train stops are at shorter intervals of distance. The Southern denies this. Leland's list of open and prepay stations shows 61 stations on the applicant's lines and 39 on the corresponding mileage of the Southern. According to time tables published by the two roads for the guidance of their employees, the average interval of distance is 2.8 miles for each road. This comparison covers 114.3 miles of the applicant's railroad, omitting the two branch lines. For the applicant's line between Charlotte and Gastonia, for which no freight time-table is published, the stops were taken from the passenger time-tables. The applicant has more listed stations at which freight is received and delivered than the Southern. So far as the record shows some of these may be mill sidings that the Southern does not list in the same way. In a country well supplied with good roads, the station interval on the Southern appears short enough to cover ordinary needs well, particularly as cars on mill sidings are handled wherever placed. Excepting the proper handling of local less-than-carload freight any advantages shown for the applicant's freight service are of minor importance.

Every point of any importance now reached by the P. & N. except Mount Holly and Anderson, was served by the Southern before the P. & N. was built, and is still served by it. Mount Holly was and is served by the Seaboard, and Anderson by the Blue Ridge Railroad, a subsidiary of the Southern. The only new town ever established on the P. & N. is Lyman, S. C., which is also on the Southern's [fol. 73] main line. There is no gateway or territory open to the applicant that is not already served by the Southern and its connections.

Some stress is put upon the need of the proposed new lines to supply industrial sites, particularly at stream crossings, for which there is said to be an active demand. Water is needed for plant operations and not for power purposes. Past and prospective industrial growth is based largely upon the use of electric power distributed by the Duke companies, which are planning the early construction of three large auxiliary steam plants on the proposed lines, and have projected additional plant construction to about 1932. Testimony for the applicant is that conditions along the proposed line to Winston-Salem are more favorable for

mill sites than between Charlotte and Gastonia. The vice-president of the Southern in charge of traffic testified that he had never before heard it suggested that a new railway is needed in Southern territory to accommodate industries seeking to build plants, and that there are innumerable sites available. Another witness for this protestant says that *that* the Southern crosses the same streams that would be crossed by the applicant's proposed line, and offers the same opportunities for industrial development; that industrial development in the South is going generally along the Southern, in its local territory; and that a number of mills have been built along rivers to be served by spurs or branches from the Southern and other railways. The freight-traffic manager of the Coast Line, which owns a half interest in the Southbound, testified that industrial sites are plentiful along the Southbound; that the line of that carrier parallels the Yadkin River for about 13 miles, and crosses or skirts a number of streams; and that a number of industrial sites are available along its Nissen spur in [fol. 74] Winston-Salem. It is shown that, outside of Winston-Salem, there have been 32 industries, mostly of a minor kind, established along the Southbound in the last seven years. There has been no remarkable industrial growth along the Southbound that could indicate a need for additional rail facilities. On the Southern's Charlotte-Winston-Salem line there is only one textile mill between Mooresville and Hanes, the latter being a station close to Winston-Salem. This is a distance of about 50 miles, in which the line crosses the Yadkin and South Yadkin Rivers and a number of their tributary creeks. The testimony as a whole does not establish that the need for new industrial sites is immediate or pressing. The country is wide and is covered generally by electric-power transmission lines.

A claim is made that the proposed Charlotte-Winston-Salem line is needed because it would provide a shorter and quicker connection between its termini, the two largest and most rapidly growing cities in North Carolina. Charlotte is served by the Seaboard, the Norfolk Southern, the applicant, and three lines of the Southern. Winston-Salem is served by the N. & W., the Southbound, and three lines of the Southern. The applicant, in its supplemental return to our questionnaire, shows the population of places along

its proposed Charlotte-Winston-Salem line, named in geographic order, as follows: Charlotte 50,780, Derita 103, Kannapolis 7,050, Landis 972, China Grove 1,027, Salisbury 16,310, Spencer 2,510, Yadkin 25, Tyro 25, Winston-Salem 58,230. The figures are from the United States census of 1920, except for Yadkin and Tyro. These two villages, with a combined population estimated at 50, are the only places on the proposed line that are not on the Southern. All of the others, except Derita and Winston-Salem, are on the Southern's double-track main line. Salisbury is at the [fol. 75] junction of the Southern's Asheville-Morristown line with its Washington-Atlanta line. At Barber, about 11 miles west of Salisbury, the Asheville-Morristown line intersects the Southern's Charlotte-Winston-Salem line. There are two rail routes between Salisbury and Winston-Salem, one by Barber and one by Lexington, both requiring change of train. A third route exists via Greensboro, but it is quite indirect. The cities are connected by a hard-surface highway which passes through Lexington.

An agricultural extension agent at Salisbury, a witness for the applicant, testified that the country from Spencer to Winston-Salem is rugged, that the soil is not fertile, and that there has not been much recent progress in agriculture; that the farmers raise general farm crops, especially those that can be hauled to shipping points at least cost, tobacco in particular; that the raising of livestock and poultry is rather on the increase; and that additional transportation facilities would prove a convenience for marketing crops and for bringing in supplies, and would promote greatly the development of the country.

With respect to mineral deposits it is testified that the proposed Winston-Salem line would make available large deposits of clay for brick and tile, of limestone, and of building sand and stone, for all of which there is a large and growing demand. No evidence is offered as to the size or location of these deposits. The owner of a granite quarry served by a spur from the Yadkin Railroad, 5 miles southeasterly from Salisbury, says that Rowan County has a granite belt 9 miles long by from 0.5 to 1.5 miles wide, now crossed only by the Yadkin Railroad, and that another railroad entering the territory would undoubtedly cross the granite belt and greatly facilitate its development. He ad-

mits that he does not know where the applicant's proposed [fol. 76] line would be located. As it would run close to the Southern in this section it would not open up any new territory. There is no other testimony as to mineral resources between Charlotte and Winston-Salem, except that the proposed route passes a granite quarry that now trucks to Winston-Salem. No idea of its size is given or of the length of haul. There is testimony that there is some timber in the region, but it does not appear that this is very important.

An exhibit introduced by the applicant shows that in 1920 the value of farm crops in the counties between Charlotte and Winston-Salem, i. e., Cabarrus, Davidson, and Rowan Counties, was slightly less, per square mile of total area, than the corresponding average for the State of North Carolina, notwithstanding the nearness of this section to industrial towns. Per capita the value of agricultural products of these counties was approximately one-half as great as for the State.

The population of the cities, towns, and villages along the proposed line from Spartanburg to Gastonia, according to the United States census of 1920, is shown as follows: Spartanburg 24,483, Cowpens 1,284, Gaffney 5,065, Blacksburg 1,512, Kings Mountain 2,800, and Gastonia 12,871. All of these points are on the Southern's Washington-Atlanta double-track line and on the hard-surfaced highway which parallels it closely from Spartanburg to Greensboro. The testimony for the applicant is that the territory between Spartanburg and Gastonia is less highly developed industrially than that on each side of it, which is served both by the applicant's railroad and the Southern's main line. It has less industry than the territory between Gastonia and Charlotte, but it does not appear that it is less developed than the territory between Spartanburg and [fol. 77] Greenville. Little information is given about the agricultural development in this section, but the country appears to be superior in this respect to that between Charlotte and Winston-Salem.

Little testimony was offered to show the need for interurban passenger service over the proposed lines. One of the applicant's witnesses testified that passenger transportation would not be so important, because of the competi-

tion of busses and automobiles over the good highways, but that there would be a certain amount of passenger transportation that would help the general progress. Other testimony is to the effect that the extensions would enable the applicant to get back a heavy passenger traffic that has been diverted to the highways; that the Winston-Salem extension would pass through a prosperous and thickly populated territory, a part of which is remote from steam railways; that the present minimum time between Charlotte and Winston-Salem is 3 hours 27 minutes; and that the applicant would cover it in 2 hours and 20 minutes. The time by bus is not stated. No point in this territory is distant more than 7 miles, in a straight line, from existing railways. The traffic estimate for the proposed lines for the first year of operation shows 440,785 passengers, $196,502 passenger revenue, and $70,261 express revenue. Passenger and express revenues combined amount to about 7 per cent of the total gross revenue expected. There are two passenger trains each way daily between Charlotte and Winston-Salem via Mooresville. Passenger stops on the extensions would be at the same average interval as on the applicant's existing lines. The passenger service of the proposed lines would be of some benefit to the region served, but little need for it exists.

One of the objects of the new construction proposed is to form a through line from Greenwood to Winston-Salem. [fol. 78] The applicant's proposed northern extension would connect with the N. & W. at Winston-Salem. No contract has been made between the two companies, but there have been conferences at which the applicant has received some assurances from N. & W. officials. One of the reasons for deciding to build to Winston-Salem now is the increase of coal traffic to the Carolinas, which will grow rapidly in the near future, particularly in view of the Southern Power Company's plans to build three large auxiliary steam plants, each of which is expected to consume 3,600 tons of coal a day.

The G. & F., an intervener in this proceeding, owns and operates a railroad from Madison, Fla., where it connects with the Seaboard, to Augusta, Ga., 250 miles, with 194 miles of branch lines. It is now extending its main line northward to Greenwood, 56 miles, where it will connect

with the applicant's railroad. So far as the record shows the applicant has not had any negotiations with the G. & F. As heretofore stated, the applicant estimates that its bridge traffic will amount to 12,300 carloads in the first year of operation, all of which could be handled by existing railways. The nature of the products composing this 12,300 carloads seems to indicate that the southbound tonnage would much exceed the northbound, and that a relatively small part would come from the G. & F. One of the applicant's witnesses testified that the extension to Winston-Salem would facilitate the use of the Hagerstown, Md., gateway between the Piedmont section and the North; and that shippers who could use it have found this gateway valuable in times of traffic trouble, when there was difficulty in moving freight via Washington or Norfolk. He admits that the Hagerstown gateway is open via Winston-Salem to shippers on the Southern and Seaboard, but states that [fol. 79] it is not open to shippers on the applicant's railroad, meaning, perhaps, that it is not open to such shippers without movement over connecting lines that would be disposed to favor routes that give them longer hauls. A representative of Coverdale & Colpitts, engineers, testifying for the applicant, admits that there is some possibility of a new competitive route between Hagerstown and Florida via the applicant's line. He says that there are three trunk lines operating through the Carolinas now, and that he has not given sufficient study to state whether a fourth trunk line should be formed. He estimates that the applicant's bridge traffic would be increased by 16,600 carloads a year through the proposed extensions, all of which would be diverted from other lines. It is further testified by this witness that the present routing of coal through Richmond, Va., and Durham to points on the P. & N. is very indirect and unnatural; and that the route through Winston-Salem would be the natural one, irrespective of any community of interest. It appears that this long routing is used because of an agreement between the applicant and the Seaboard under which the coal movement is diverted from the much more natural route via Winston-Salem and the Southern. The applicant's general freight and passenger agent testified that distances from Madison, Fla., by the new route would be as follows: To Hagerstown 903

miles, and to Cincinnati 1,097 miles, both via Winston-Salem; from Madison to Norfolk via Charlotte and the Norfolk Southern, 880 miles; from Savannah, Ga., to Cincinnati, via Winston-Salem, 988 miles. He concludes that these figures show that a large competing transportation system would be set up, affording at all times ample competition between the carriers in serving the southern territory, which must result in tremendous benefit to the ship- [fol. 80] ping public of the Southeast. He does not show the mileage by existing routes, and offers no other measure of transportation economy. He submits a railway junction-point map of the Southeast, upon which he has shown the proposed routes. So far as may be judged from this map, the routes he has mentioned are all much less direct than others that now exist. Possibly the route to Hagerstown may be excepted, but in this case also existing routes appear to be somewhat shorter. Moreover the advantage of using the Hagerstown route, as compared with Washington or Norfolk, has not been shown, and can not be presumed. A representative of shippers and receivers of freight in eastern North Carolina expressed the view that the competitive through route to be formed by the proposed extension might use the Norfolk Southern from Charlotte to Norfolk and intermediate points, thus strengthening that line to the benefit of the country it serves. It appears likely that the applicant would give all traffic bound to or through Norfolk to the N. & W., as it would thus secure the maximum haul on its own line.

The protestants contend that there is no public necessity for the through route that would be formed by connecting the N. & W. and the G. & F.; that this would mean another through trunk line between the North and South, whose traffic would all be at the expense of existing lines; that such diversion of traffic would not benefit the public, but would cripple the existing trunk lines; that it would further strengthen the applicant in the matter of rate divisions, since the applicant would prefer its terminal connections, and it would be difficult for other connecting lines to offer it divisions high enough to secure any traffic that it could deliver to the N. & W. or G. & F. The applicant now gets divisions of from 40 to 50

per cent of all traffic it handles in connection with the Sea-
[fol. 81] board, although the applicant's average haul on all its freight is only 28.8 miles, and the greater part of the traffic handled is long-haul business. The average freight haul on the Southern in 1926 was 187.43 miles, and it is testified that the average haul on traffic into and out of the Piedmont section is as much. The Southern and other lines have met these divisions, but secure only a small part of the traffic the applicant controls. It is admitted that the Southern and its connections reach all of the principal gateways to or through which the applicant's interchange traffic moves, and that the Southern itself reaches most of them. In 1926 the applicant delivered 17,158 loaded cars to the Seaboard, 2,499 to the Southern, 167 to the C. & W. C., and 841 to the Clinchfield. It received 34,721 from the Seaboard, 6,483 from the Southern, 1,029 from the C. & W. C., and 5,472 from the Clinchfield. The vice president of the applicant admits that the Southern could handle all of the interstate traffic that is handled by the applicant. His testimony is that from 12 to 15 per cent of the applicant's traffic is intrastate.

Witnesses for the Southern testified that all shippers on the P. & N. and those on the Southern in the territory which the applicant proposes to enter, can now ship through Winston-Salem to Hagerstown, Cincinnati, Chicago, or any other point that could be reached through that gateway, and that the proposed extensions would not give them any advantage in reaching any point beyond the local territory. The Southern has two scheduled freight trains each way daily between Charlotte and Winston-Salem, where direct connection is made with the N. & W. The time of these trains is from six to seven hours. The Southern's through freight service into and out of the Piedmont section reaches Norfolk, Rich-
[fol. 82] mond, and Potomac Yard (Washington), on the north and east; Cincinnati, Louisville, St. Louis, Knoxville, Chattanooga, and Memphis on the west; and Birmingham, New Orleans, Atlanta, Macon, Augusta, Jacksonville, Brunswick, Savannah, and Charleston, on the south. The following table shows comparative distances by the proposed Winston-Salem route and by the existing short

route to points taken as typical of the Middle West. Column A shows the short route, and Column B the proposed Winston-Salem route.

From—	To Cincinnati		To Chicago		To Detroit	
	A Miles	B Miles	A Miles	B Miles	A Miles	B Miles
Charlotte, N. C.....	554	648	839	933	812	821
Spartanburg, S. C.....	479	724	764	1,009	737	897
Greenwood, S. C.....	568	813	853	1,098	826	986
Augusta, Ga.....	612	870	897	1,155	870	1,043
Savannah, Ga.....	724	1,002	1,009	1,287	982	1,175
Vidalia, Ga.....	655	971	912	1,256	913	1,144
Valdosta, Ga.....	715	1,092	972	1,377	973	1,265
Jacksonville, Fla.....	806	1,168	1,063	1,453	1,064	1,341

The proposed route via the Clinchfield and the L. & N. hereinafter referred to, will be materially shorter than these midwestern points to Charlotte, Spartanburg, Greenwood, and Augusta, than the applicant's Winston-Salem route, except from Charlotte to Detroit, where the propesed Winston-Salem route would be 27 miles shorter. The L. & N. route via Atlanta or Birmingham is more than 200 miles shorter from Augusta, Savannah, Vidalia, Valdosta, and Jacksonville to Cincinnati and Chicago, and from 128 to 281 miles shorter to Detroit than the proposed route via Winston-Salem. Elements other than distance that affect the comparative cost of transportation are not shown.

[fol. 83] No evidence was introduced by the G. & F. In its brief it contends that the proposed routes are necessary to provide independent and competitive through routes between the South, East, and West via the Norfolk Southern and the N. & W.; that they would also supply local needs for transportation; that the volume of new business in prospect is sufficient to justify the proposed expenditure; that the extensions will materially benefit the G. & F., a comparatively weak line; that the loss of traffic to the protesting carriers would not impair their ability to serve the public: and that the whole theory of the law is to promote competition rather than to strangle the country by monopoly.

The Seaboard objects to the proposed construction as unnecessary, and because it would divert traffic from its lines. Its vice-president testified that the proposed ex-

tensions might divert from the Seaboard 60 per cent of the traffic it now interchanges with the applicant; and that in 1926 the Seaboard's revenue from this traffic amounted to $2,408,958.75. The Seaboard would sustain a further loss by the diversion of traffic to the applicant's railroad as a bridge line between the G. & F. and the N. & W.

The Coast Line also objects to the proposed construction chiefly on the ground that the formation of the proposed new through route is unnecessary and would seriously affect its revenues, as it would short-haul its line on traffic to and from Georgia and Florida. It now interchanges with the G. & F. at Augusta. This interchange is limited to traffic between Georgia and Florida points and the Carolinas and the East. Testimony is that the Coast Line would not voluntarily open joint through routes between south Georgia and Florida points and points west of Spartanburg and north of Winston-Salem in connection [fol. 84] with the G. & F. and the P. & N.; that it would oppose the opening of joint through routes via Willacoochee, Ga., G & F. to Greenwood, P. & N. to Charlotte, and Norfolk Southern to Norfolk; and that if a route via Willacoochee and Greenwood were forced, its haul from Jacksonville would be only 118 miles instead of 662 miles to Richmond, or 434 miles to Wadesboro, N. C., the southern terminus of the Southbound. The Coast Line, the Florida East Coast, and the Seaboard have spent large sums in recent extensions and improvements to promote the development of Florida and handle its traffic with the North. Florida traffic was the most important factor in bringing about the double-tracking of the Coast Line from Jacksonville to Richmond. The Coast Line and the N. & W. each own one-half of the capital stock of the Southbound, whose line extends from Wadesboro to Winston-Salem, 90 miles. They built the line jointly to form a connection, particularly to haul coal south and incidentally to develop the local territory. It is largely a bridge route, its average freight haul being 74.07 miles in 1926. Winston-Salem is the most important point on its line and supplies most of its traffic other than bridge traffic. Development at other points during the past seven years appears to have been moderate. The Southbound has not

been directly profitable to the Coast Line, has not paid any dividends, and has only shown an income credit balance during the last two years. The profit and loss debit balance on December 31, 1926, was $272,833.35. No complaints have been made of the Southbound's service. The freight-traffic manager of the Coast Line testified that he was convinced that the opening of new routes via the G. & F. and the P. & N., as proposed to be extended, might cause a loss to the Southbound of 48 per cent of its present revenue.

[fol. 85] The L. & N., the Clinchfield, and the C. & W. C., all of which are closely allied with the Coast Line, object to the proposed extensions for the reasons that they would not serve any public necessity and would divert traffic from their lines and from the projected routes of the L. & N. in connection with the Clinchfield. The L. & N. and the Coast Line have jointly leased the Clinchfield, assuming thereby financial obligations of approximately $53,293,000. The Clinchfield's line extends from Spartanburg northerly to Elkhorn City, Ky., nearly 300 miles, where it connects with the Chesapeake & Ohio. The L. &. N. depends largely on revenue from hauling coal. It serves four large coal fields, of which the eastern Kentucky field is the greatest. The chief objects of the L. & N. in leasing the Clinchfield were to open up new and shorter routes between the eastern Kentucky coal fields and Carolina points and to create a new merchandise route between Kentucky, the Ohio River crossings, and Central Freight Association territory on the one hand and Carolina points on the other. To carry out this purpose it is necessary to connect its lines with the Clinchfield. In Finance Docket No. 5322, Construction and Operation by L. & N. R. R., 124 I. C. C. 581, decided May 26, 1927, we authorized the L. & N. to build a line, 13.87 miles long, from Chevrolet, Ky., to Hagans, Va., connecting its southeast Kentucky or Harlan County line with its southwest Virginia line, which connects at Norton, Va., its eastern terminus, with the Interstate Railroad. The estimated cost of this construction was $5,287,000. Authority was also granted to operate under trackage rights over the Interstate Railroad between Norton and a connection with the Clinchfield. The full plan adopted by the L. & N. provides for a direct connection between its Harlan

County line at Chevrolet and the Clinchfield at Speers [fol. 86] Ferry, Va. This line would be 50.13 miles long and is estimated to cost $15,683,000. The plan also provides for a connecting link between the two L. & N. lines in eastern Kentucky, so that both may be connected with the Clinchfield. This connection would be 18.13 miles long and is expected to cost $6,967,500. The ultimate plans for connecting the L. & N. lines with the Clinchfield therefore involve an estimated expenditure of more than $22,000,000 for new lines. The L. & N. represented in the case last cited that in view of the uncertainty as to the amount of traffic available it would not be justified in carrying out the full plan immediately. The route through Norton by the connection heretofore authorized will shorten the haul on coal from Harlan to Marion, N. C., and to Spartanburg 100 miles and 69 miles, respectively. It was estimated that within a short time after this connection was established the L. & N. would handle about 2,100,000 tons of coal a year over it from the Harlan County field to the Carolinas, as compared with about 300,000 tons moved in 1925 by the company's present circuitous routes. The testimony is that in making its application in Finance Docket 5322 the L. & N. had no knowledge of a plan to connect the P. & N. with the N. & W. and G. & F., or either of them, and did not take into consideration the diversion of traffic from the Clinchfield route that would follow. The assistant to the vice-president of the L. & N. in charge of traffic testified that the applicant's proposed Winston-Salem line would be only 11 miles shorter than the Southern's existing line; that its construction would not bring about any reduction in rates on coal; that it is clear that the applicant expects the Duke Power Company and affiliated interests to get all coal hereafter from mines on the N. & W.; and that connecting the [fol. 87] P. & N. with the N. & W. would result, because of various influences, in diverting to the P. & N. considerable traffic, both coal and merchandise, now handled by the Clinchfield. In 1926 the Clinchfield delivered to the applicant, either directly or through the Seaboard, 3,832 carloads of coal, of which 1,581 cars were destined to two of the Duke plants. It handled to and from points beyond its northern junctions 5,539 carloads of freight other than coal and 4,693,342 pounds of less-than-carload freight to

and from points on the P. & N. or passing over it. The witness believes that most of this traffic would be jeopardized, probably diverted. On cross-examination he admitted that the rates on coal to points on the P. & N. are 20 cents a ton less from the Clinchfield than from the N. & W., and that probably the greater part of the coal for Spartanburg and points south on the applicant's line would still be taken from the Clinchfield unless mines on the N. & W. should absorb the difference. In 1926, 2,983 carloads of coal were moved by the Clinchfield to the applicant's South Carolina division. It is further testified that the applicant for many years has controlled a very large part of the traffic to and from points on its lines; that if its lines are extended the same influence will close most of the traffic to ordinary solicitation by present transportation routes; that the coal traffic controlled by the Duke interests would be largely diverted to the new route via Winston-Salem; that it would be difficult, if not impossible, to allow the applicant as large divisions for movement by other routes; that existing routes are sufficient to handle all traffic for many years to come and are generally shorter than those which the applicant would establish; and that the new merchandise routes from the Carolinas via the Clinchfield and the L. & N. will [fol. 88] be generally much shorter than those the applicant would create via Winston-Salem.

The Clinchfield has filed a brief in its own behalf. This is confined to the effect the construction of the proposed lines would have on its own road. The nature of the objections offered and the evidence relied upon have been shown sufficiently by the testimony for the L. & N. One of the applicant's witnesses testified that his company intends to continue to interchange traffic with the Clinchfield at Spartanburg after its proposed lines are built, and that he expects this interchange to increase in volume. This testimony might be more impressive if witnesses for the applicant had not testified that all of the steam railways serving the territory, the Southern included, would benefit by the construction of the proposed extensions.

The C. & W. C. is allied closely with the Coast Line and the L. & N. Its railroad extends from Spartanburg, through Greenwood and Augusta to Port Royal, S. C., 247 miles, with one branch line from McCormick to Anderson,

S. C., 59 miles and another from Laurens to Greenville, S. C., 36 miles. Connection is made with the Coast Line at Augusta and at two points between Augusta and Port Royal, and with the Clinchfield at Spartanburg. Other connections are generally with competitive lines. The railroad was built about 42 years ago through a rather sparsely settled part of South Carolina. The testimony is that it was exceedingly unprofitable until the Clinchfield was built; that since then it has earned enough to spend considerable sums in improving its property; that since Federal control, and chiefly since the Clinchfield lease was made, it has spent over $1,600,000 for heavier rail and bridges, and additional equipment; that its revenues are not great now; [fol. 89] and that it has no other source to secure the funds needed to better its service and to enable it to compete with stronger lines, such as the Southern. This carrier further claims that it is able to handle much more traffic than it has, and that it would be seriously injured by the diversion of traffic from the Clinchfield to the P. & N. and the N. & W.

On behalf of the applicant it is asserted that the attitude of the protesting carriers toward the proposed extensions, and the refusal of the Southbound to grant it trackage right or to sell to it part of its capital stock, show that the proposed construction is necessary to provide added security for its present investment. The applicant's president testified that if the protesting carriers can stop the completion of its line, as projected, there is no reason why they can not strangle its existing lines; that the public is interested in preventing that; and that one of the reasons that prompted the applicant to go ahead with the construction was to create the through route, and to protect its situation against the roads that are opposing it in this case. In view of the divisions received by the applicant from its connections, its rapidly growing revenues, and other facts of record, its fears do not appear well founded. There is no attempt to show that its railroad can not be operated profitably without extension, or that the return on the investment would be insufficient, except in so far as that may be implied from the applicant's fear of strangulation. No evidence was offered to show any past

attempt to strangle the applicant, and it is plainly evident that if any such attempt had been made it resulted in failure. The applicant's gross revenues were $926,242 for the year ended June 30, 1915, $1,749,046 in 1921, and $2,517,362 in 1926. Its net railway operating revenue for these years [fol. 90] was $335,143, $419,715, and $844,575, respectively. Its general balance sheet, as of April 30, 1927, showed total corporate surplus of $3,134,645.53. Under its agreement with the Seaboard the applicant receives 50 per cent of the rate on traffic from Atlanta and points north to points on the P. & N. through Greenwood. The applicant's lines get 40 per cent on all business from the Virginia gateways. This division applies on a 4-mile haul from Pinoca to Charlotte. Business from west of the Virginia gateways is shipped via the Seaboard to the applicant at Charlotte.

Traffic and revenues of the proposed extensions for the first year of operation are estimated by the applicant as follows: 82,320 carloads of freight, mean haul 28.8 miles, earnings per car $43.70, gross freight revenue $3,597,384; passengers 440,785, passenger revenue $196,502; express revenue $70,261; miscellaneous revenue $25,870; total revenue $3,890,017. It is estimated that 21 per cent of the freight traffic will have origin and destination on the P. & N.; that 44 per cent will originate on other lines and be destined to stations on the P. & N.; that 20 per cent will originate on the P. & N. and be destined to points beyond the line; and that 15 per cent will originate at and be destined to points beyond the P. & N. The applicant has obtained contracts from a large part of the shippers along its route binding them to give it at least one-half of their traffic. In connection with coal traffic the testimony is that the Southern Power Company expects to build three steam-power plants on the proposed lines, one somewhere along the Yadkin River between Salisbury and Winston-Salem; one between Spartanburg and Gastonia; and one on the lower end of the system. Each of these plants will consume about 3,600 tons of coal a day. The Southern Power Company now has a large steam plant on the Southern [fol. 91] near Salisbury, the traffic from which would be diverted to the proposed Winston-Salem extension. The gross revenues of the extensions are estimated to increase

8.4 per cent each year over the preceding year, rising to $5,822,344 for the sixth year.

Net railway operating income of the extensions is estimated at $1,361,506 the first year, increasing to $2,503,608 the sixth year. These estimates equal 35 per cent of gross revenues in the first year and 43 per cent in the sixth. The percentage for the existing lines in 1926 was 33.55.

The estimated cost of construction is $6,684,377 for the Charlotte-Winston-Salem line, and $4,954,088 for the Gastonia-Spartanburg line, a total cost, without equipment, of $11,638,465. It is expected that 18 new 60-ton locomotives, costing $75,000 each, will be required for freight service for the first year, and five more locomotives of the same type for the fifth year. The applicant represents that the passenger and freight cars which it now owns are ample to provide for its present needs, but that 10 additional passenger cars and probably 200 freight cars of the present type may be required after five years. The applicant will continue to depend on the steam roads for freight cars. The figures presented in these estimates show clearly the minor importance of passenger traffic, or of any ordinary interurban movement. The protestants admit that the applicant would probably get at least as much traffic and revenue as it has estimated, and that the proposed investment would be profitable to it because of it connection with the Duke interests.

Maximum grades of the proposed line would be 1 per cent, compensated for curvature. Grading would be heavy for both lines. Track would be laid with 100-pound rail. [fol. 92] The applicant wishes to proceed with the work as soon as possible, and estimates that it can be completed in 18 months.

The ability of the applicant to finance the work is not questioned. It has about $1,500,000 available in its treasury, and wishes to issue about $10,000,000 of bonds under its mortgage, preferred stock or debentures for $4,000,000 to $4,500,000, about $1,000,000 of equipment-trust bonds, and common stock for any additional funds needed. That is a total of about $15,000,000 or $15,500,000 in securities, without counting the common stock or the treasury funds. This is about 16 to 20 per cent more than the total estimated cost.

It is contended by the protestants that the proposed lines would not only be almost wholly competitive, but that the applicant's competition is of an unequal or unfair nature, because of the applicant's relation to the various Duke interests and the power of those interests to control and influence traffic in its favor. They assert that because of these relations, the P. & N., with its proposed extensions, would be in effect, a plant facility for the industries controlled and influenced by the Duke interests, and that its operation would result in a violation of the commodities clause of the Hepburn Act. The applicant contends that the community of interest which exists, or is alleged to exist, between itself and the Duke Power Company and its affiliated companies is neither improper, illegal, nor opposed to the public interest; that stock ownership in industries by the Duke interests is not now used and never has been acquired or used to influence traffic to the applicant; that hauling coal to the plants of the Southern Power Company will be a comparatively small part of its business, and is not illegal nor opposed to the public interest; that the proposed ex- [fol. 93] tensions would be built to serve the public generally, not to serve the Duke or other allied interests; and that the public demand for the extensions is unanimous. It admits that technically the applicant is controlled by the so-called Duke interests, but claims that the true ownership of the stock is vested in a very large number of stockholders.

There are outstanding 85,841 shares of the applicant's capital stock, of which the Duke Power Company owns 10,090 shares and the Duke Farms Company owns 34,309 shares. The remaining 48.28 per cent is owned by 486 stockholders. The Duke Farms Company, a holding company, is controlled through a majority stock ownership by the J. B. Duke estate. The Duke Power Company is controlled by the trustees of the Duke Endowment, a perpetual trust created by J. B. Duke on December 11, 1924. The property originally conveyed to this trust was valued at about $40,000,000. There has since been added $10,000,000 by a specific bequest of Duke's will, and it it expected that about $40,000,000 more will be received from his residuary estate. The trust indenture provides that 20 per cent of the net income of the endowment must be retained and added to the

corpus of the trust until the sums so added shall amount to $40,000,000. In the event that Duke's daughter Doris should die without issue there may be another large addition to the trust fund. The trust funds may be invested only in the securities of the Duke Power Company or its subsidiaries or in Government, State, or municipal bonds. The trustees are required, when they have funds to invest, to lend them to these companies or to buy their securities, to the extent that such loans or securities are available on satisfactory terms. They are advised not to change any investment in these companies except in response to the [fol. 94] most urgent and extraordinary necessity and they have no power to do so except by unanimous vote of all the trustees at a meeting called for that purpose. The trustees are a self-perpetuating body of 15 members. The will of Duke disposed of a majority interest in the Duke Farms Company and directed that the company be dissolved and its assets distributed to its stockholders. This stock is a part of his residuary estate. One-third of this residuum, plus a sum sufficient to yield a net annual income of $100,000, is bequeathed to the Doris Duke Trust, the rest to the Duke Endowment. The Doris Duke Trust and the Duke Endowment will therefore hold 11,436 and 32,963 shares, respectively, of the applicant's capital stock. Because the stock held by the Duke Endowment will be only 38.4 per cent of the stock outstanding, the applicant contends that the so-called Duke interests will not exercise control of the applicant. The income from that part of the residuary estate bequeathed to the Doris Duke Trust may not be loaned except to the Duke Power Company, nor invested, except in securities of that company, or of the Quebec Development Company, or the subsidiaries of either, or in Government, State, or municipal bonds. If Doris Duke should die without issue the undistributed part of her share of the residuary estate will go to the Duke Endowment. The will fixes the extreme life of the trust at 21 years after Duke's wife and daughter shall both be dead. The trustees of the two trusts are, and will be, the same. It appears reasonable to conclude that effective control of the applicant will be exercised with a unity of interest.

The Duke Power Company owns the Southern Power Company and three smaller power companies of the same general region, viz.: the Great Falls Power Company, the

Waterce Power Company, and the Western Carolina Power [fol. 95] Company. It *is* also owns more than 98 per cent of the capital stock of the Southern Public Utilities Company. The Southern Power Company, which owns the Catawba Power Company, in connection with its affiliated companies, supplies electric energy to some 300 cotton mills in the Carolinas, including most of those in the Piedmont section. It also supplies electricity to the applicant, to the utility companies controlled by the Southern Public Utilities Company, and to other industries. Its lines cover the region along the applicant's railroad and its proposed and projected extensions. From Greenville, Anderson, and Greenwood to the Yadkin River they cover generally a width of from 50 to 75 miles; thence to Durham they are less extended laterally. It owns 10 water-power plants, and steam plants at Greenville, Duncan, Mount Holly, Spencer, Greensboro, and Eno (near Durham). Its present capacity is about 850,000 horsepower.

The Southern Public Utilities Company is a retail power, gas, street railway, and, in a few cases, water-supply company, that operates in the Carolinas. It owns the local public utilities at Winston-Salem, Reidsville, Burlington, Greensboro, High Point, Salisbury, Hendersonville, Hickory, Charlotte, and Bessemer City, N. C.; and at Anderson, Greenville, Greer, Chester, Fort Lawn, and Spartanburg, S. C.

It is shown that the combined Duke interests own 52,411 shares of stock in 13 textile-manufacturing companies, plus $51,400 of stock in four others. All of these mills appear to be along the lines of the Duke power companies, but most of the mills and most of the investment are not along the applicant's present lines. The Republic Cotton Mills were bought to acquire their water rights. Testimony for the applicant is that the other textile-mill stocks were [fol. 96] bought to aid the development of industry in the region. The Duke interests own, in addition, $2,662,500, par value, of stock, valued at $9,981,475, in the R. J. Reynolds Tobacco Company, which is engaged in manufacturing tobacco at Winston-Salem, and 172,311 shares in six other tobacco companies, valued at $7,917,610. They own 102,000 shares of the 6 per cent preferred stock of the Aluminum Company of America. They also own 1,000 shares of the Carolina Standard Gas Products Company,

two electrochemical companies that appear to be of small importance, and some warehouses at Charlotte that cost $140,000. They have one-half interest in the Mercantile Development Company, which owns a building at Charlotte that serves both for warehouses and for general offices for all the power companies, having been built primarily for the latter purpose. They control several business establishments at Charlotte and a short-line steam railroad at Durham. J. B. Duke and the Duke Power Company, at different times since 1905, have owned and sold stock in 36 other cotton mills along the lines of the Duke power companies, in amounts ranging from 50 to 5,206 shares. The list includes nine companies at Greenville. The applicant claims that these stocks were bought to aid industrial development, and not to control railroad traffic. The Southern contends that traffic can be influenced to the applicant by industries not on its line. The applicant's president testified that the large holdings in Judson Mills were not acquired to influence traffic. The uncontroverted evidence for the protestants is that this mill gives the applicant all of its business which the applicant can handle, although it is also reached by the Southern.

The protestants contend that the contracts under which the Southern Power Company sells "secondary power" [fol. 97] give that company such wide discretion as to the amount of current it will supply and the time at which it will be furnished, that the power company can coerce users of secondary power to ship over the P. & N. The form of contract used appears to give the power company a broad discretion with respect of furnishing this class of power. There is no testimony that it differs from the general practice of power companies or that it has been used to control traffic. It might well influence shippers decisively without any desire on the part of the power company to use it in that way. The applicant owns warehouses at six of the principal points along its line. A contract for the use of space in one of these warehouses, made April 1, 1926, requires the lessee to ship or cause to be shipped over the P. & N. all freight to or from the premises, provided the lessor provides facilities and rates equal to those of competing carriers. The testimony for the protestants is that the Duke Power Company also controls traffic to the applicant through its ownership of warehouses in which space is

leased under similar contracts. The applicant claims that its contract was made on an old form, not the one intended for current use; that such contracts were formerly in general use by the railways in this section, and that the clause in question is not now enforced. The witness Green attributes much of the Southern's loss of traffic to the applicant at Charlotte to the use, under such contracts, of centrally located warehouses owned by the power companies.

It is contended by the protestants that the composition of the applicant's board of directors indicates that it has been chosen, not for its fitness to direct the affairs of a railroad, but to control traffic in its favor. There are 25 directors. One is chairman of the Duke Endowment, president of the Southern Power Company, and an executor of J. B. Duke's [fol. 98] will. At least 20 are prominently connected with the ownership and management of cotton mills in the general territory in question, representing a large number of mills at many points. Nineteen are described as the owners, presidents, or heads of mills, sometimes of several, and most of them are not shown to have any other qualifications. The applicant's president, and its vice-president and general manager, are the only two who appear to have had experience in railway management. Some attempt is made to show that the protesting carriers, or some of their subsidiaries, have directors with similar affiliations, but the evidence shows no similar directorate in the case of the steam railways.

In August and September, 1925, 93 shippers of Salisbury signed contracts with J. B. Duke and his associates to give at least one-half of their traffic to a railroad to be built by the Duke interests. Similar agreements have been signed by 260 citizens, merchants, and manufacturers of the towns between Gastonia and Spartanburg. The applicant represents that it secured these contracts because it wished to form some estimate of the traffic it could count upon. In view of the testimony as to the applicant's fixed determination to build the line, this method of making a traffic estimate hardly seems necessary.

Witnesses for the applicant admit the great importance of the Southern to the Piedmont section, and say that if its revenues should be so affected as to impair its service it would be a calamity, but they are sure that the proposed construction could not have that result. There is much

testimony for the applicant to the effect that all the railways in the territory would benefit by the increased traffic the new lines would produce. Testimony for the Southern is that the effect of building the P. & N. was to divert about [fol. 99] 50 per cent of the traffic at mill points reached by both railroads, and that on the line from Greenville to Greenwood this made it necessary to reduce the service from one through freight and one local freight each way daily to one freight train each way, handling both classes of freight, and that there had been no subsequent growth of traffic that would justify restoring the former service. A witness for the Southern testified that that company now handles annually 151,248 carloads of freight, inbound and outbound, at the stations into which the applicant proposes to build, which yield a revenue of $120.16 a car. This estimate is based upon actual records for two months, which, taken together, are said to be fairly typical. The applicant has estimated that it would get 70,020 carloads of freight, excluding bridge traffic, in the first year of operation. This is somewhat less than one-half of the existing traffic. Some of this it might handle in connection with the Southern, but it would naturally try to haul as much as possible to and from Winston-Salem and Greenwood in connection with the N. & W. and the G. & F. Witnesses for the Southern accept the applicant's estimate of traffic, but state that it is probably too low. Using the approximate figure for bridge traffic testified to for the applicant, viz.: 12,000 carloads, and deducting this from the total number of cars estimated by the applicant for the first year, it is estimated by the Southern that the remaining cars, at $120.16 per car, yield it an annual revenue of $8,449,651; and that all this business would be lost to it, in addition to some part of the bridge traffic. Extending this calculation to the traffic the applicant has estimated for succeeding years, it is claimed that the Southern's loss of revenue in the first six years of operation of the extensions would be $63,581,935. The Southern asserts that the [fol. 100] sinister feature of the applicant's competition is its control of traffic to and from plants in allied ownership, and it attributes to the powerful Duke interests the fact that the applicant has been able to make contracts in advance to take away one-half of the Southern's business on a line whose service the applicant would merely duplicate.

There is some testimony for the Southern concerning the part of its loss that would be sustained through the diversion to the P. & N. of coal traffic now handled by the Southern to the steam plants of the Southern Power Company, and also the coal traffic that would be moved to the three new steam plants to be built upon the P. & N. The Southern claims, and it is not directly controverted, that the three new plants could be reached as well from its own line. The testimony for the applicant is that 10,800 tons of coal a day would be handled to plants of the Southern Power Company over its proposed extensions. If this rate of consumption were maintained for 313 days it would amount to 3,380,400 tons a year. The extensions would also haul coal destined to other plants of the Duke power companies. A very material part of the applicant's revenue would be derived from that source.

In the application alternate routes were proposed for the Winston-Salem extension, one of which would pass through the city of Concord, and the other would diverge about 8 miles west therefrom. The applicant elected to adopt the latter route. The city of Concord and the county of Cabarrus while supporting the application generally, contend that the Winston-Salem route through Concord should be adopted, and ask for a finding accordingly. In view of the conclusions reached upon the merits, it is unnecessary to consider further this requested change of route.

The proposed lines would closely parallel existing rail- [fol. 101] ways throughout their entire length. They would touch no local point of importance not served by existing lines, and the territory to which they would bring rail transportation closer is very small and of limited possibilities in agriculture. The territory to be traversed has excellent highways. There is bus and truck service on highways that closely parallel the proposed route. The railways have good and prompt service to all points that could be reached by the proposed lines and their connections. Some defects are shown in the less-than-carload service of the Southern in this territory, but they are not inherent in the physical property and should be removed, or at least diminished, by administrative measures which are being taken. The existing lines have a present developed capacity in excess of present traffic requirements,

and a much greater potential capacity. The through routes proposed in connection with the applicant's extended line are generally longer than existing routes, so far as the record permits comparison, and are not shown to have substantial advantage in other respects, or any economy in the cost of transportation. They would no doubt tend to strengthen the G. & F., which carrier, however, has obtained permission to extend its line without mentioning these proposed extensions as necessary to its success. They would also tend to diminish the usefulness of the connection which is to be built between the L. & N. and the Clinchfield, and to postpone carrying out the ultimate plan for that connection, which would effect a further reduction of 52 miles in the L. & N.-Clinchfield route. This enterprise has more value to the system of through transportation than anything that could be accomplished by the proposed extensions. The proposed lines would earn a revenue sufficient to justify their construction, if it were [fol. 102] not to be diverted from existing lines, particularly from the Southern, which they would closely parallel. They would owe this revenue in part to the power of the applicant to control traffic of companies owned by the same interests, and in some degree to the power of those interests to influence the routing of traffic other than their own. There would no doubt be some benefit to the region immediately served, notwithstanding some impairment that would be likely to result, temporarily at least, in the service of existing lines. These benefits would be largely of a competitive nature, that is at the expense of other localities, and could probably be urged in favor of duplicating most of the railway lines in the United States. Competition reasonably necessary should be provided without extensive duplication. The construction of the applicant's railroad and of its proposed and projected extensions present a rather extraordinary case of paralleling an existing line. The presumption against such paralleling as is now proposed can not be overcome by such evidence as is here presented. The investment proposed would not be justified by the net addition to the railway revenues of the country. The competitive nature of the enterprise is aggravated by the association of the applicant with large interests which have the power to control or influence much traffic on other grounds than transportation service. There would be some

advantage, both to the applicant and to the communities served, in joining applicant's two existing lines. Only a small part of the traffic handled on either is or would be destined to points on the other. They are being operated successfully, and the evidence presented does not justify further paralleling the Southern closely for a distance of 53 miles.

Upon the facts presented we find that the present and future public convenience and necessity is not shown to [fol. 103] require the construction by the applicant of the lines of railroad described in the application. An order will be entered denying the application.

EASTMAN, Commissioner, concurring:

The report in this proceeding to my mind contains an excellent analysis of the facts and exposition of the law, and I find no difficulty in agreeing with the conclusions reached. It seems desirable, however, by way of emphasis to summarize briefly certain essential reasons for denying this certificate, as I see them.

In determining whether the construction of new railroad lines should be authorized, doubts should, I believe, be resolved in favor of their construction, particularly when new territory not already supplied with railroad service is being opened up. That this has been our policy in granting certificates of exigency the record of past cases amply demonstrates. But desires to avoid any undue restriction of enterprise ought not to lead us to approve new construction which involves needless, costly, and wasteful duplication of existing facilities. That is what the law was intended to prevent.

Experience and observation have shown that a proposed new line of railroad is always desired by the people in the territory affected. If the expression of such desire is in itself a sufficient reason for the granting of a certificate, then the law might as well permit unlimited construction. Plainly there must be other evidence that public convenience and necessity require a new line.

Here it is not proposed to open up any new territory, but to build a third line of track parallel to and practically within sight of an existing double-track railroad which is admittedly providing good service and is not used to anything like its inherent capacity. The attempted justification for such duplication of facilities rests largely upon a claim

[fol. 104] of superior "flexibility" in electric operation of the kind proposed. If that be a reason here for adding a third track alongside of an existing double-track line with large reserve capacity, it must also be a reason for third-tracking in a similar way many other double-track lines which operate through manufacturing districts. Carried to a logical conclusion such a policy would result in a heavy increase in the transportation burden upon the people of this country. But this claim of need for more "flexible" operation is not impressive, for reasons sufficiently indicated in the main report. Under present conditions, a third track through this Carolina district, opening up no new territory and reaching no new markets, would be sheer economic waste. We would be derelict in our duty if we permitted such waste. One mistake of this kind has recently, in my judgment, been made in Florida and it ought not to be repeated here.

If there were need for strengthening this conclusion, such need would be supplied by the fact that this proposed new railroad is closely affiliated with powerful private industrial interests in the Carolinas. The evils of interrelation between transportation lines and industries which they serve are manifest. Such arrangements breed privilege and preference, and run counter to the spirit and I believe also, in many cases, the letter of the law. There are enough at present without adding to the sum total, and I trust that we shall soon be able to test the legality of existing interrelations of this character.

McManamy, Commissioner, dissenting:

With the conclusions expressed by the majority I am not in accord. To my mind applicant has fully met every requirement of the statute.

The ability of the applicant to finance the work has not [fol. 105] been questioned nor has objection been raised to the proposed financial structure. Public interest and the need for the service has been shown by the testimony of the Governor and members of the Railroad Commission of South Carolina, the Governor and members of the Corporation Commission of North Carolina, the county and municipal officers of every county and municipality that will be reached by the proposed line, and by some not reached

by the proposed line who desire changes in its location or extensions in order that they also may be served by it. Civic and commercial organizations, manufacturers, merchants, and farmers along the proposed route, with exceptional unanimity, appeared and testified as to the need for and the benefits which would flow from the additional service. Surely no more convincing showing of public interest could be made.

Against this, as stated in the report of the majority, "no opposition is voiced except by the carriers now serving the territory." These carriers admit that the new line would get at least as much traffic and revenue as it has estimated and it is not shown that the ability of the carriers now serving the territory to render service would be thereby impaired. It is admitted that "there would no doubt be some benefit to the region immediately served notwithstanding some impairment that would be likely to result, temporarily at least, in the service of existing lines." The existing lines are not weak railroads. They are among the most prosperous of the country. Their earnings are ample. They are approaching, if not already in, the recapture class. Under such conditions benefit to the region immediately served should not be denied because of the probability that some temporary impairment might result to existing lines when as a matter of fact the showing is that diversion of all [fol. 106] the traffic which protestants claim would be diverted would not seriously affect their revenues.

It is true that the proposed line will parallel existing steam lines at distances varying from 0 to 13 miles, but this is also true of practically every other electric line. It is also true that it will not immediately be self-supporting from new business which it will create, although the showing is that a substantial portion of its revenues will come from such sources. The record shows that the proposed line will, because of more frequent service and stops, render a service more nearly approaching that of motor trucks, which is admittedly desirable in an industrial district such as this. On the showing here made the certificate should be granted.

I am authorized to say that Commissioner Esch joins in this dissent.

BRAINERD, Commissioner, dissenting:

The record shows that the applicant is an electric railway other than street or suburban, that it is engaged in the general transportation of freight, and that it is not operated as a part of a general steam-railroad system of transportation. Although it is true that this carrier, thus engaged and operated, is subject to our jurisdiction under section 15(a) of the act because "engaged in the general transportation of freight," it is, nevertheless, an interurban electric railway and, not being operated as a part of a general steam-railroad system of transportation, it is in express terms excluded from the commission's jurisdiction to issue or refuse a certificate of public convenience and necessity. Interurban electric railways are brought under the provisions of the act concerning the issuance of certificates [fol. 107] of public convenience and necessity only when they are operated as a part of a general steam-railroad system of transportation. Paragraph (22) of section 1 reads as follows:

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The act does not distinguish between a "commercial railroad operated by electricity" and an interurban electric railroad not operated as a part of a general steam-railroad system of transportation, and we can make no such distinction.

The motion to dismiss the application for lack of jurisdiction over the subject matter should have been granted.

Commissioner Aitchison, necessarily absent, did not participate in the disposition of this case. Commissioner Woodlock was necessarily absent, but had he been present he would have concurred in the result.

Order—Entered April 3, 1928

A hearing and investigation of the matters and things involved in this proceeding having been had, and the com-

mission having, on the date hereof, made and filed a report [fol. 108] containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part thereof:

It is ordered, That the application herein be, and it is hereby, denied.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 109] In United States District Court

[Title omitted]

Marshal's Return—Filed June 5, 1928

District of Columbia, ss:

W. Jesse Roberts, being duly sworn, deposes and says that he is and was at the time of service of the paper herein referred to a citizen of the United States, over the age of twenty-one years, and that he is and was at said time a duly qualified deputy United States marshal in and for the District of Columbia and legally authorized to serve court process in said District.

That deponent personally served the petition hereto annexed on John G. Sargent, Attorney General of the United States, by delivering to and leaving with said John G. Sargent in person a true copy of said petition on the 28th day of May, 1928.

W. Jesse Roberts, Deputy U. S. Marshal, District of Columbia.

Subscribed and sworn to before me this 4th day of June, 1928. Lillian A. Trammell, Notary Public, D. C. My commission expires June 6, 1928.

[File endorsement omitted.]

[fol. 110] [Title omitted]

District of Columbia, ss:

Harold T. Scott, being duly sworn, deposes and says that he is and was at the time of service of the paper herein re-

ferred to a citizen of the United States, over the age of twenty-one years, and that he is and was at said time a duly qualified deputy United States Marshal in and for the District of Columbia and legally authorized to serve court process in said District.

That deponent personally served the petition hereto annexed on the Interstate Commerce Commission by delivering to and leaving with T. A. Gillis, Assistant Secretary of the Interstate Commerce Commission, in person a true copy of said petition on the first day of June, 1928.

Harold T. Scott, Deputy U. S. Marshal, District of Columbia.

Subscribed and sworn to before me this 4th day of June, 1928. Lillian A. Trammell, Notary Public, D. C. My commission expires June 6, 1928.

[fols. 110½-113] Due and legal service of a copy of the within Petition accepted at Greenville, S. C. this 29th day of May, 1928.

(Signed) Edward S. Ragsdale, Assistant United States Attorney.

Filed May 29, 1928. D. C. Durham, clerk U. S. Dist. Court Wast'n Dist., S. C.

[fol. 114] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER RE INTERVENTION PETITION OF SOUTHERN RY. CO. ET AL.

The petition of Southern Railway Company, Seaboard Air Line Railway Company, Charleston and Western Caroline Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, to be allowed to intervene as parties defendant in this cause being presented to the Court;

Ordered that a copy of the intervention petition be served upon the Petitioner and the Defendant herein and that they or either of them show cause, if any they have, to this Court at Anderson, S. C., at 10 A. M. on the 12 day of June, 1928, why the intervention as prayed should not be allowed.

This the 5 day of June, 1928.

H. H. Watkins, Judge.

[fol. 115] In United States District Court

[Title omitted]

Intervention Petition of Southern Railway Company, Seaboard Airline Railway Company, Charleston and Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky

To the Honorable Judges of the District Court of the United States for the Western District of South Carolina:

Come now your petitioners, Southern Railway Company, Seaboard Air Line Railway Company, Charleston and Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, and respectfully represent that they were parties to the proceeding before the Interstate Commerce Commission in which the order was made which is sought to be set aside and annulled in this litigation, and have an interest in this litigation and desire to be permitted to assert their rights by intervention in this cause and to become parties defendant to said cause, and for grounds of intervention, say: 1. That each of them is a carrier by railroad, engaged in the transporta-

tion of persons and property, subject to the Interstate Commerce Act, and they were respectively incorporated and exist under the laws of the several states as shown, viz: Southern Railway Company, under the laws of the state of Virginia; Seaboard Air Line Railway Company, under the laws of the state of Virginia; Charleston & Western Carolina Railway Company, under the laws of the State of South Carolina; Atlantic Coast Line Railroad Company, under the laws of the state of Virginia; Louisville & Nash- [fol. 116] ville Railroad Company, under the laws of the state of Kentucky; Carolina, Clinchfield & Ohio Railway, under the laws of the State of Virginia; Carolina, Clinchfield & Ohio Railway of South Carolina, under the laws of the state of South Carolina; and Clinchfield Northern Railway of Kentucky, under the laws of the state of Kentucky.

2. That petitioners' lines of railroad traverse the states of North Carolina and South Carolina, and serve as interstate carriers the territory served or proposed to be served by the Piedmont & Northern Railway Company, petitioner in this cause, or form a through route or links in a through route that serves said territory.

3. That the application of the Piedmont & Northern Railway Company to the Interstate Commerce Commission for a certificate that the present and future public convenience and necessity require the construction by it of certain proposed extensions of its railroad from Spartanburg, South Carolina, in a northeasterly direction to Gastonia, North Carolina, and from Charlotte, North Carolina, in a northeasterly direction to Winston-Salem, North Carolina, so directly and indirectly affected adversely the interests of your petitioners and was as they conceived it, so contrary to the public convenience and necessity as that they were permitted to intervene before the Interstate Commerce Commission in the cause known as Finance Docket No. 6208, and the particular and several interests of petitioners will appear from the report of the Commission on said application, in which the Commission found, held and ordered that the present and future public convenience and necessity was not shown to require the construction by the applicant of the lines of railroad described in the application.

4. That while neither the facts found by the Commission nor the order of the Commission based thereon, holding that the present and future public convenience and necessity was not shown to require the construction by the applicant are attacked by petitioner in this cause of action, and are not before the Court, this suit is brought to enjoin, set aside and annul said order of the Commission on the ground that the Commission was without jurisdiction [fol. 117] of the application of petitioner, for the reasons, (a) that applicant's railway is, and the lines it proposes to construct and operate will be, an interurban electric railway, which is not and will not be operated as a part or parts of a general steam railroad system of transportation, and (b) that said new mileage will constitute necessary and essential parts of a railway project undertaken prior to the effective date of paragraphs 18 to 21, both inclusive, of Section One of the Interstate Commerce Act, as amended by The Transportation Act.

That if the Court should, by final decree, set aside said order for lack of jurisdiction on either of the grounds set forth in the petition, then the protection to which Petitioners are entitled under the law of the United States, as set forth in said paragraphs 18 to 21, inclusive, of the Interstate Commerce Act, will be denied them, and special damage will result to the properties of petitioning corporations through and by virtue of the annulment and setting aside of said orders of the Interstate Commerce Commission.

All of which appears more specifically from the said Order of the Interstate Commerce Commission and as will be shown by the further pleadings of your petitioners if allowed to intervene.

Wherefore said Southern Railway Company, Seaboard Air Line Railway Company, Charlotte and Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, as parties in interest to the proceedings before the Commission in which the order now sought to be annulled and set aside was made, pray leave to intervene and to be treated as parties defendant hereto, with the

right to all notices issued in said cause and to be represented by their counsel as parties to this said suit.

W. N. McGehee, S. S. Alderman, S. R. Prince, L. E. Jeffries, E. M. Blythe, P. A. Bonham, Attorneys for Southern Railway Co. James F. Wright, At-
[fol. 118] torney for Seaboard Air Line Railway Company. F. B. Grier, Attorney for Charleston & Western Carolina Railway Company. Carl H. Davis, Attorney for Atlantic Coast Line Railroad Company. Wm. C. Burger, Attorney for Louisville & Nashville Railroad Company. Jas. J. McLaughlin, Attorney for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky.

[fol. 119] In United States District Court

[Title omitted]

Order Allowing Intervention of Southern Ry. Co. et al.

The petition of Southern Railway Company, Seaboard Air Line Railway Company, Charleston and Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, to be allowed to intervene as parties defendant in this cause being presented to the Court;

And the Petitioner being present and not objecting to the consideration of the matter at this time and the Defendant, the United States, waiving notice of this hearing, and the petition to intervene being read and the objection of Petitioner Piedmont & Northern Railway Company having been entered but not argued, and the matter having been duly considered by the Court, and it appearing to the Court that the several petitioning railroads were parties to the Application before the Interstate Commerce Commission, on which the Order herein sought to be enjoined was issued, and that intervening petitioners have an interest in the subject-matter of this suit sufficient to entitle them to become parties to this suit;

Ordered, that the Southern Railway Company, Seaboard Air Line Railway Company, Charleston and Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky have leave to intervene as defendants [fol. 120] and be represented by counsel in this cause; that they are allowed thirty days from this date in which to answer; and that all future notices, orders, etc., running to Defendants shall be also served upon them.

This the 29th day of June, 1928.

Morris A. Soper, United States District Judge.

To the foregoing order Petitioner, Piedmont and Northern Railway Company, duly excepted.

Morris A. Soper, United States District Judge.

[fol. 121] [File endorsement omitted]

[fol. 122] In United States District Court

[Title omitted]

Answer of Intervening Defendant Railways—Filed July 18, 1928

Southern Railway Company, Seaboard Air Line Railway Company, Charleston and Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, defendants, for answer to the petition filed herein, say:

1. Defendants admit the matters and things alleged in paragraph I, with this exception: Defendants deny that [fol. 123] Petitioner owns and operates a line of interurban electric railway in either the State of South Carolina or the State of North Carolina, and deny that petitioner is

within the exception of those provisions of the Interstate Commerce Act excluding from regulation or control interurban electric railways not operated as a part or parts of a general steam railroad system of transportation.

2. Defendants admit the matters and things alleged in paragraph II, with this exception: Defendants deny that the order of the Commission complained of is one that the Court has jurisdiction to enjoin, set aside or annul, and deny that this Court has jurisdiction under the provisions of the Act of Congress approved October 22, 1913 (28 U. S. Code 47) as alleged, and deny that the Court has jurisdiction under its general equity jurisdiction as alleged.

3. Defendants admit the matters and things alleged in paragraph III in manner and form as alleged.

4. Defendants admit the matters and things alleged in paragraph IV in manner and form as alleged.

5. Defendants admit the matters and things alleged in paragraph V in manner and form as alleged.

6. Defendants admit that the authority of the Commission, conferred by paragraphs (18) to (21), both inclusive, of Section 1 of the Interstate Commerce Act, as amended, does not extend to interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

Defendants deny "that the Commission has no authority over the construction of the lines of railway which petitioner proposes to construct;" and deny "that the Commission was without jurisdiction of said application;" and [fol. 124] deny that the order of the Commission refusing to dismiss said application and taking jurisdiction over the subject matter thereof is null and void for the reasons set out in the petition or for any other reason.

Defendants deny each and every of the averments contained in sub-paragraph (a) of paragraph VI except as the same may have been found by and appear in the Interstate Commerce Commission's Report and Order in Finance Docket No. 6208 (138 I. C. C. 363) and the evidence before the Commission in said cause.

Defendants deny that petitioner's railway as constructed and as proposed to be constructed "is not now, nor has it ever been, nor ever will be, operated as a part or parts of a general steam railroad system of transportation."

Defendants deny sub-paragraphs (b), (c), and (d) of paragraph VI of the petition.

7. Defendants deny the matters and things alleged in paragraph VII, and each and every part of the same, in manner and form as alleged, except that they admit that paragraph (18) of Section 1 of the Interstate Commerce Act, as amended, is, in part:

"(18) After ninety days after this paragraph takes effect, no carrier by railroad subject to this Act shall undertake the extension of its line of railroad or the construction of a new line of railroad or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless or until there shall have first been obtained from the Commission a certificate," etc.

and except that defendants admit the following portions of sub-paragraph (a): That petitioner was incorporated by [fol. 125] special act of the Legislature of South Carolina, adopted February 24, 1911, but avers that the same was amended January 27, 1927, and avers that, as found by the Commission,

"The charter grants to the applicant 'all the rights, privileges, and franchises given unto railway corporations and street railway corporations under and by virtue of the general statutes of this State and all amendatory and supplemental acts.' The applicant is specifically authorized 'to construct, maintain, and operate a line or lines of railway, with one or more tracks, to be operated by electricity or other motive power' in and through certain counties in South Carolina and such other counties in the State as may be selected by the corporation, with the right 'to purchase, lease, or otherwise acquire the railway and other property, including the rights and franchises, of any other railroad company or street railway company now in existence or hereafter created, in this State or in any other

State of the United States' and 'to hold, possess, operate, enjoy, exercise, and dispense of the same.' "

They admit that the section of petitioner's line between Charlotte and Gastonia was completed and put into operation in July, 1912; the section from Greenwood to Greenville in November, 1913, and the section from Greenville to Spartanburg in April, 1914.

8. Defendants deny the matters and things alleged in paragraph VIII, and each and every part of the same, in manner and form as alleged, except that they admit that if the order of the Interstate Commerce Commission is not set aside and annulled, petitioner will be prevented from constructing the new mileage aforesaid, and operating the [fol. 126] the same, but defendants deny that this will cause petitioner to suffer great and irreparable loss and damage, or any loss.

9. Defendants have no knowledge of any threat of taking proceedings to enforce the order of the Commission. Defendants aver that the order of the Commission is in all things lawful and that if and when the same is violated, the action to be taken will doubtless then be determined by the United States and the Interstate Commerce Commission in accordance with law and the statutes made and provided in such cases.

10. Further answering the petition, and specifically paragraph VI thereof, which sets forth petitioner's claim of lack of jurisdiction of the Interstate Commission for the reason that petitioner's railway is an interurban electric railway and is not operated as a part or parts of a general steam railroad system of transportation, defendants say that, as found by the Commission and as set forth in its report, among the chief and controlling facts which led the Commission to conclude:

"It appears clearly that the applicant's railroad, as proposed to be extended, would be a commercial railroad operated by electricity and not an electric interurban line within the meaning of paragraph (22) of section 1. We are of opinion that we have jurisdiction of the application."

are:

(1) Petitioner's road is of standard gauge, 80 pound rail, well built according to the standards of steam railway construction, and between terminals is located on private right of way. The maximum grade is 1 per cent, compensated for curvature, which is about the same as on the Southern's double track main line, and was obtained at the expense of [fol. 127] heavy construction. The bridges are designed for the same loading as other standard railroads in that territory.

(2) Petitioner's traffic is handled largely in cars owned by steam railroads, but petitioner owns 337 freight cars of all classes, of which 165 are automobile cars, 99 are other box cars, and the remainder are flat cars, ballast cars, work cars, etc. These are of ordinary steam railroad type, and move freely on foreign roads. Applicant's freight trains are hauled by locomotives weighing from 55 to 95 tons each, rated to haul from 800 to 1200 tons. The average freight train is 20 cars. Not infrequently its trains are of 45 or more cars.

(3) Ninety-two per centum (92%) of petitioner's revenue is from freight; freight revenue has steadily increased since 1913. In 1926 operating revenues were $2,517,362, of which $2,288,092 were from freight, $138,540 from passengers, $40,377 from mail and express, and $50,393 from other sources.

Of 72,886 loaded cars handled, 68,370 cars were interchanged with steam railroads, most of these in interstate movement reaching all over the United States. It was stated by petitioner that it expected to handle 82,320 carloads of additional traffic the first year the proposed extensions were in operation, of which 12,000 carloads would be bridge traffic.

(4) Petitioner formerly maintained a regular Pullman schedule in connection with the Seaboard Air Line. It has an extensive traffic organization for a road of its size. It is a party to the tariffs of the steam roads and to the uniform express contract of the American Railway Express Company. It is a member of the American Railway Asso- [fol. 128] ciation, the Southern Freight Association, and

other traffic organizations of the steam roads. It is represented by powers of attorney in nearly every traffic bureau of the United States, and has 502 published tariffs. In 1926 it initiated 42 changes of rates to distant points. It follows the methods of the steam roads in matters of rate divisions, interline billing, and in all relations with shippers and consignees.

(5) The proposed line will be designed primarily to carry freight. As extended, the line would connect with the Norfolk & Western and Southern at Winston-Salem, and with the Georgia & Florida Railroad at Greenwood. One of the purposes of the proposed construction is to form a new through route for the movement of freight between the North, East, and West, and Florida points. The functions of applicant's line and its methods of operation do not differ materially from those of a steam road in any essential particular, except in the use of electric power. This fact is borne out by the testimony of petitioner's traffic manager at the hearing, who testified as to petitioner:

"that it performs all of the characteristic service of an interurban railroad and equals the service of the standard railroads in other respects—that it is an interurban railroad 'and plus.' "

and also by the statement of the president of the applicant in his appearance in November, 1920, before the Interstate Commerce Commission in Docket No. 11774, South Carolina Fares and Charges, (60 I. C. C. 290), at which time he stated:

"the Piedmont & Northern Railway Company is an electrically operated railroad in that it employs electric loco-[fol. 129] motives instead of steam locomotives, and that is the only distinction between it and the steam roads."

11. Defendants, for further answer to petitioner's averment that the Commission lacked jurisdiction in that petitioner's present and proposed line of railway is an "interurban electric railway" within the meaning of the exception contained in paragraph 22 of Section 1 of the Interstate Commerce Act, say that the meaning of said term as used in paragraph 22 is furnished by the context and cor-

rect definition is aided by ascertainment of the railroad policy introduced by the Transportation Act of 1920 and then by determining whether the policy so announced by Congress will be frustrated, and if the evil sought to be remedied is present in petitioner and will go unchecked if petitioner is classed within the exception. Defendants therefore allege and rely upon those parts of the Report and Order of the Commission and the Record before the Commission which show that petitioner's railway now competes and will when extended the more actively compete with defendants' railroads, and with a character of competition the law prohibits the defendants from meeting; due to the aggravated and extraordinary paralleling of defendants' existing railroads there will be no new territory of consequence opened up that is not now adequately served by existing railroads which are not utilized to anything like their present capacity. The net addition to the railway revenues of the country will not justify the investment and the monetary loss inflicted upon each of defendants will be extremely heavy.

Defendants also set up and rely upon the foregoing averments of fact as the same appear in the Order and Report [fol. 130] of the Commission, as specific answer to petitioner's objection to the intervention of these defendants and exception to the Court's overruling of said objection, as showing the direct and vital interest of defendants in the result of this cause.

12. For further answer to the petition, and specifically to paragraph VII thereof, which avers that the authority of the Commission conferred by paragraph (18) of Section 1 of the Interstate Commerce Act does not extend to projects undertaken by a carrier prior to 90 days after the effective date of said paragraph, which was February 28, 1920, defendants say:

(1) The Interstate Commerce Commission, on May 25, 1920, issued a notice to all carriers interpreting said paragraph (18) of Section 1 of the Interstate Commerce Act, and after setting out said paragraph, said:

"The transportation act was approved, and said paragraph took effect, on February 28, 1920, and therefore the provisions of the paragraph apply to all extensions, con-

structions, acquirements, and operations, and to engaging in transportation under the act after May 28, 1920, and also to abandonments of all or any portion of a line of railroad, or the operation thereof, after said last mentioned date. Inquiries have been made of the Commission as to whether or not certificates of convenience and necessity are required in cases where the extension or construction has been undertaken but the work has not been completed on May 28, 1920.

The Commission holds that if the projected extension or construction is actually undertaken in good faith on or before ninety days after the approval of the transportation act, 1920, by a carrier subject to the interstate commerce act which will operate the line, certificate will not be re- [fol. 131] quired of such carrier either for extension or construction or for acquirement, operation or engaging in transportation under the act, but the undertaking must embrace not merely purpose or intent to extend or construct, but also the actual doing in good faith of acts calculated to completely effect such purpose.

All carriers contemplating or engaged in such work should immediately notify the Commission of all the facts and circumstances connected therewith, in order that the Commission may determine whether or not the work has been actually undertaken as contemplated by the act and whether or not a certificate of convenience and necessity will be required.

The Commission further holds that the mere provision in a charter or prospectus, or the making of a preliminary survey for the extension or construction of a line of railroad, does not constitute an undertaking of such extension or construction, and that where a line of railroad has been constructed by a carrier, corporation or other person, not subject to the act, a certificate of convenience and necessity will be required before the line may be acquired or operated by a carrier subject to the act and before any carrier may engage in transportation under the act over or by means of such additional or extended line of railroad."

Petitioner gave the Commission no notice as required by above set forth notice of the Interstate Commerce Commission. It was within the jurisdiction of the Commission to interpret said paragraph (18) and to originate machinery for the enforcement thereof, and the petitioner is concluded

by the findings of fact of the Commission on this administrative question, and a judicial review of the Commission's findings and determination of the question of whether Peti- [fol. 132] tioner has brought itself within the exception may not be had.

(2) The section of the line between Charlotte and Gastonia was completed and put into operation in July, 1912; the section from Greenwood to Greenville in November, 1913, and the section from Greenville to Spartanburg in April, 1914. No mileage has since been constructed and no other steps taken until November 3, 1926, confirmatory of the claimed original intention to build the lines now proposed.

(3) The act incorporating the applicant contains a proviso to the effect that unless the corporation shall enter and begin actual construction of the lines in any county into which it is empowered to enter, either expressly or under the general clause of the act, within ten years from March 1, 1911, all rights and franchises given to enter that county shall expire. This limitation was removed by an amendment to the statute adopted January 27, 1927. For nearly six years, that is, from March 1, 1921, to January 27, 1927, the petitioner had no charter power to build a line from Spartanburg to Gastonia.

(4) That petitioner did not have at the inception of the project and has not now, charter power to construct a railroad in the State of North Carolina.

(5) The maps submitted with the application to the Commission showed two divergent alternative routes between Charlotte and Winston-Salem, and it was not until a few days prior to the hearing that the applicant made its election of the route it proposed to follow.

(6) Efforts were made by the applicant to secure trackage rights over the Winston-Salem Southbound between Lexington, North Carolina, and Winston-Salem, with or without a stock interest in the owning company. These [fol. 133] negotiations were opened August 8, 1925, and ended in failure on February 18, 1927.

(7) The first corporate action with respect to the proposed construction was a resolution of the Board of Directors of petitioner adopted November 3, 1926, calling a

meeting for the purpose of authorizing the directors to construct the proposed lines. Such stockholders' meeting was held on December 8, 1926, and the necessary authority was granted.

(8) On December 2, 1910, the Seaboard Air Line made a traffic contract with the Piedmont Traction Company and the Greenville & Spartanburg Railway Company, which were controlled by the so-called Duke interests and were later acquired by the applicant. This contract recited that the two Duke Companies proposed to construct, among others, a line from Charlotte through Greensboro to Durham, North Carolina. The contract provides that the Duke companies are not obliged to build any of the proposed lines and not limited in building others. In the protracted negotiations that led to this agreement, the evidence shows that a line to Winston-Salem was never mentioned as a part of the plan.

(9) Since 1916 the map of petitioner's line printed in the Official Railway Guide has shown the railway as projected from Greenwood to Durham, but not to Winston-Salem. There was never prior to the hearing of Petitioner's application by the Interstate — Commission, any definite intention to build to Winston-Salem.

(10) That there was, as averred and claimed by petitioner, a plan or project to construct the extension now proposed is refuted by the record and evidence before the Interstate Commerce Commission in Finance Docket No. 6208, now referred to and made a part of this answer, in [fol. 134] that therein it is shown that to so construct and operate would violate paragraph 8 of Section 1 of the Interstate Commerce Act (49 U. S. Code 1) known as the Commodities Clause, and the Commission did not and the Court will not find that either petitioner or petitioner's projectors intended to do an act which would violate a statute of the United States and create a situation of interrelation between transportation and industry contrary to the letter and spirit of said statute of the United States.

(11) The finding of the Commission that the construction of the proposed line was not begun in good faith prior to the effective date of paragraph (18) of Section 1 of the Act, and thereafter diligently prosecuted to completion, is

sustained by substantial evidence, and is conclusive on the Court.

12. Further answering, defendants allege that the matters and things set forth in the petition and sought to be put in issue before the Court, were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the Interstate Commerce Act; that the Commission, in its report, in writing, made after full hearing, stated its conclusions and issued its order in the premises, and petitioner is foreclosed by said findings of fact of the Commission, based on substantial evidence, of which the parties were advised. Defendants allege that the facts set forth in the report of the Commission, and each and all of the same, are true and correct.

[fol. 135] Wherefore, having fully answered, defendants pray that the petition be dismissed and for such further and other order as may be appropriate.

L. E. Jeffries, S. R. Prince, S. S. Alderman, Blythe & Bonham, Attorneys for Southern Railway Company. Jas. F. Wright, Attorney for Seaboard Air Line Railway Company. Carl H. Davis, F. B. Grier, Attorneys for Charleston & Western Carolina Railway Company. Carl H. Davis, Attorney for Atlantic Coast Line Railroad Company. Edward S. Jouett, Wm. C. Burger, Attorneys for Louisville & Nashville Railroad Company. James J. McLaughlin, Attorney for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky.

[fol. 136] *Duly sworn to by L. E. Jeffries. Jurat omitted in printing.*

[fol. 137] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION

To the Honorable the Judges of said Court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150, I hereby enter the appear-

ance of the Interstate Commerce Commission, as a party defendant, and of myself as its counsel, in the above-entitled suit.

Daniel W. Knowlton.

[fol. 138] In United States District Court

[Title omitted]

Order Allowing Intervention of I. C. C.

It appearing that the Interstate Commerce Commission has filed its intervention as defendant in the above entitled cause, pursuant to the Act of June 18, 1910 (36 Stat. 539, 543).

Now, therefore, it is ordered that the Interstate Commerce Commission be, and it hereby is, allowed to intervene as defendant, and be represented by counsel in this cause.

This 28th day of June, 1928.

Morris A. Soper, United States District Judge.

[fol. 139] In United States District Court

[Title omitted]

Motion to Dismiss and Answer of Interstate Commerce Commission

Motion to Dismiss

Comes now the Interstate Commerce Commission, hereinafter called the Commission, intervening defendant in the above-entitled case, and moves that the petition be dismissed upon the ground that—

I

On its face, the petition, including the exhibits attached to and made a part of the petition, shows that the subject-matter of complaint is a certain order of the Commission which is a negative order within the meaning of the deci-

sion of the Supreme Court of the United States in Procter & Gamble Company v. United States, et al., 225 U. S. 282, and therefore is an order which is not within the jurisdiction of the court in this case.

II

The order of the Commission, which petitioner seeks to have set aside, annulled, and forever enjoined, is not an order within the meaning of the act of Congress entitled, "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year One Thousand Nine Hundred and Thirteen, and for Other Purposes," approved October 22, 1913, (38 Stat. 208, 219, Ch. 32), or within the meaning of any act authorizing suits against the United States in the District Courts of the United States to enjoin, set aside, annul or suspend orders of the [fol. 140] Interstate Commerce Commission.

III

The petition does not contain either statements or allegations of fact which show that the said order of the Commission causes petitioner, or will cause petitioner, such legal injury as entitles it to maintain this suit.

ANSWER

The Commission, without waiving its objections to the jurisdiction of the court and to the sufficiency of the petition, stated in its motion to dismiss, and now and at all times hereafter, saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition contained, answers and says:

I

Answering the opening paragraph and paragraph 1 of the petition, the Commission admits that the allegations therein contained are true, except that it denies that petitioner is an interurban electric railway within the meaning of the excepting clauses of those provisions of the interstate commerce act, which contain excepting clauses excluding

from their operation interurban electric railways not operated as a part or parts of a general steam railroad system of transportation, and denies that petitioner is not subject to the primary terms, and the Commission's authority thereunder, of said provisions.

II

Answering paragraph II of the petition, the Commission admits that the petition purports to institute a suit to enjoin, set aside and annul an order of the Commission, and that it purports to invoke the jurisdiction of this court under the provisions of the act of Congress entitled "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year One Thousand Nine [fol. 141] Hundred and Thirteen, and for Other Purposes," approved October 22, 1913. The Commission denies, however, that the petitioner has properly instituted such suit and denies that it has properly invoked the jurisdiction of this court.

III

Answering paragraphs III and IV of the petition, the Commission admits that the allegations therein contained are true.

IV

Answering paragraphs V to X, inclusive, of the petition, the Commission admits and alleges that it made and entered and served upon all the parties to the Commission proceeding the report and order of April 3, 1928, which is referred to in said paragraph V, and copies whereof are included in Exhibit C of the petition and made a part of said petition.

The Commission further admits and alleges that, prior to the making, entering, and serving of said report and order, as aforesaid, it accorded to the parties to said proceeding, including petitioner herein, the full hearings provided for in the interstate commerce act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said report and order was submitted to the Commission for consideration, on behalf of said parties, including the plaintiffs herein, by their respective counsel; that at said hearings questions relating to said matters were fully argued and submitted to the

Commission for determination, on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and made and entered said report and order, which included the Commission's decisions, conclusions, and order in the premises; that upon the evidence before it, and as shown in and by said report and order, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence before the Commission in said proceeding.

Further answering paragraphs VI and VII of the peti- [fol. 142] tion, the Commission denies that the authority conferred upon it by section 1, paragraphs (18) to (21), inclusive, of the interstate commerce act, does not extend to the petitioner and over the construction of the lines of railway which petitioner proposes to construct, denies that it was without jurisdiction of petitioner's application, and denies that its said order is null and void. The Commission, on the contrary, alleges that its said authority does extend to petitioner and over its proposed construction of lines, that it had jurisdiction of said application and that its said order is a valid order.

Further answering paragraph VIII of the petition, the Commission denies that petitioner will either suffer irreparable injury or any other legal injury, for the reasons set forth in said paragraph, or for any other reason, unless said order is set aside and annulled by the court.

Further answering paragraph IX of the petition, the Commission disclaims information sufficient to form a belief as to the truth of the allegations therein contained and, therefore, neither admits nor denies that said allegations are true.

The Commission further alleges that, in making said report and order, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including all matters covered by the allegations of the petition herein.

The Commission further alleges that, in making said order and in determining that it had jurisdiction so to do,

it did not act either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support its action and jurisdiction in the premises; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of and all the allegations to the contrary, contained in said petition.

[fol. 143] Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said petition, in so far as they conflict either with the allegations herein, or with the statements or conclusions of fact included in said report and order of the Commission, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission, by Daniel W. Knowlton, Assistant Chief Counsel.

Duly sworn to by Joseph B. Eastman. Jurat omitted in printing.

[fol. 144] [File endorsement omitted]

[fol. 145] In United States District Court

[Title omitted]

Answer of the United States to the Petition—Filed June 21, 1928

First Defense

United States for the First Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The action of the Interstate Commerce Commission in denying by its order entered April 3, 1928, the application of Piedmont and Northern Railway Company, a copy of which is attached to the petition as Exhibit A, is

negative only and does not constitute an order of the Commission within the meaning of the Commerce Court Act of June 18, 1910 (c. 309, 36 Stat. 539), and Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 221).

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

[fol. 145½] Second Defense

United States for the Second Defense to the ppetition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The petition prays "for a permanent injunction decreeing that the Commission was without jurisdiction of the application of petitioner, * * * and that the order of the Commission of April 3rd, 1928, taking jurisdiction of said application and denying the same, be set aside and annulled, and that the Commission be forever enjoined from taking any action or proceeding against your petitioner under said order," which is a prayer for a declaratory or advisory judgment or decree from the Court against anticipated action of the Commission which is neither threatened nor impending.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Third Defense

United States for the Third Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The finding of the Commission that "upon the facts presented we find that the present and future public convenience and necessity is not shown to require the construction by the applicant of the lines of railroad described in the application" is conclusive and binding on the petitioner.

[fol. 146] Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Fourth Defense

United States for the Fourth Defense to the petition filed herein against it says:

The District Court is without jurisdiction to entertain the petition. The Commission is authorized under paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act as amended by Transportation Act, 1920 (c. 91, 41 Stat. 477), to issue the certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad; and the petitioner, having failed to secure the certificate after full hearing on its application duly made in that behalf, the Court is without jurisdiction to relieve the petitioner from the terms and provisions of the statute which become absolute.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Fifth Defense

United States for the Fifth Defense to the petition filed herein against it says:

Having invoked the jurisdiction of the Commission by its application dated March 25, 1927, a copy of which is attached to the petition as Exhibit A, the petitioner is estopped to invoke the equity jurisdiction of the District [fol. 147] Court for the purpose of maintaining a suit for permanent injunction decreeing that the Commission was without jurisdiction to hear its application.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Sixth Defense

United States for the Sixth Defense to the petition filed herein against it says:

The petition with the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the United States.

Wherefore defendant moves to dismiss the petition and prays that an appropriate order may be entered.

Seventh Defense

United States for the Seventh Defense to the petition filed herein against it says:

I, II. On information and belief defendant admits the facts alleged in paragraphs I and II and the unnumbered paragraph introductory to paragraph I, in manner and form as alleged, with these exceptions: defendant denies (a) the petition was filed to enjoin, set aside and annul an order of the Interstate Commerce Commission; (b) the petitioner owns and operates its line of railway in either the State of South Carolina or the State of North Carolina in such a manner and in such a way as to exempt and exclude the petitioner from the jurisdiction of the Interstate [fol. 148] Commerce Commission under paragraph (22) of Section 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920 (c. 91, 41 Stat. 478), which provides "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation;" (c) the suit may be maintained under the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 221), or under the general equity jurisdiction of this Court.

III. Defendant admits the facts alleged in paragraph III in manner and form as alleged.

IV. Defendant admits the facts alleged in paragraph IV in manner and form as alleged.

V. Defendant admits the facts alleged in paragraph V in manner and form as alleged.

VI. Except as shown in the report of the Interstate Commerce Commission, a copy of which is attached to the petition as Exhibit C, defendant has no knowledge of the facts and conclusions alleged in paragraph VI, in manner and form as alleged; and insofar as the allegations of paragraph VI conflict with the facts found and findings made by the Commission this defendant denies the same and each and every part of the same; specifically, this defendant denies [fol. 149] the allegation of sub-paragraphs (b), (c) and (d) of paragraph VI and each and every part of the same in manner and form as alleged.

VII. Defendant denies the facts and conclusions alleged in paragraph VII and each and every part of the same in manner and form as alleged, with these exceptions: defendant admits (a) petitioner was incorporated in South Carolina by a special act of the Legislature adopted February 24, 1911, and amended January 27, 1927; (b) the section of petitioner's line between Charlotte and Gastonia was completed and put in operation in July, 1912; the section from Greenwood to Greenville in November, 1913, and the section from Greenville to Spartanburg in April, 1914. Specifically, this defendant denies the allegation of sub-paragraph (b) of paragraph VII, and each and every part of the same in manner and form as alleged.

VIII. Defendant denies the facts and conclusions alleged in paragraph VIII and each and every part of the same in manner and form as alleged, with this qualification: Defendant alleges that paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act as amended by Transportation Act, 1920 (c. 91, 41 Stat. 478), prevent the petitioner from constructing the new mileage and operating the same and that it is not the order of the Commission which prevents the petitioner from so doing as alleged.

IX. Defendant denies that the defendant has threatened to subject the petitioner to prosecutions for fines and penalties in the event that petitioner should proceed with the [fol. 150] construction of the new mileage aforesaid, and defendant states that its course with respect thereto has neither been determined nor considered.

Further answering the petition, this defendant admits the Commission promulgated its report on April 3, 1928, a copy of which is attached to the petition as Exhibit C, styled "Finance Docket No. 6208, Proposed Construction of Lines by the Piedmont and Northern Railway Company," which is officially reported as 138 I. C. C. Reports, at page 363, et seq.; a copy of the report is made a part hereof by reference and it is prayed that the same may be taken and considered as fully and completely as if incorporated herein in extenso. Defendant alleges that the facts and findings set forth in the report and each and all of the same are true and correct.

Defendant alleges that the facts and conclusions set forth in the petition and sought to be put in issue before the Court were all before the Interstate Commerce Commission, were fully heard and determined by it, and were within its power and authority to hear and determine under the provisions of the Interstate Commerce Act. In its report in writing with respect thereto, made after full hearing and after due notice to all of the parties, which states its conclusion, together with its decision, the matters and things of which complaint is made were fully considered and foreclosed by findings of fact based on substantial evidence adduced on the issues made by the parties.

[fol. 151] Defendant specifically denies (a) any fact or facts alleged in the petition, or any part of the same, which deny, or which seek to deny, any fact or facts found by the Commission; (b) any fact or facts alleged in the petition, or any part of the same, which are inconsistent with any fact or facts found by the Commission; (c) any and all inferences of fact from any particular fact or facts alleged in the petition, or any part of the same, which seek to deny, or which are inconsistent with any fact or facts found by the Commission; (d) any fact or facts alleged in the petition, or any part of the same, which set up, or which seek to set up, matters and things which were not before the Commission; (e) any fact or facts alleged in the petition, or any part of the same, which attack or which seek to attack the action of the Commission, and to show facts other than what the Commission has found and declared; (f) any allegations in the petition, or any part of the same, which alleged that facts were found by the Commission in its report which, as shown on the face thereof, were not so found; (g) any conclusions of law alleged and insisted upon in the petition, or any part of the same, which are inconsistent with any conclusions of law held by the Interstate Commerce Commission; (h) each and every allegation in the petition contained not herein specifically admitted or denied.

Wherefore having fully answered, defendant prays that the petition be dismissed at the cost of the petitioner and for such other and further order as may be appropriate.

Blackburn Esterline, Assistant to the Solicitor General. Joseph A. Tolbert, United States Attorney.

[fol. 152] *Duly sworn to by Blackburn Esterline. Jurat omitted in printing.*

[fol. 153] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS FOR LEAVE TO INTERVENE

To the Honorable Judges of the District Court of the United States for the Western District of South Carolina:

The National Association of Railroad and Utilities Commissioners respectfully represents:

I

That it is a voluntary Association which includes in its membership the members of the Corporation Commissions, Railroad Commissions, Public Service Commissions and other regulatory commissions and boards of all the several states of the United States, except the State of Delaware, which has no commission; and that practically all of said commissions and boards, under the laws of their respective states, exercise jurisdiction over common carriers, and particularly over interurban electric railways; and that many of said commissions and boards exercise jurisdiction over such interurban electric railways with respect to the construction of new lines and extensions of existing lines.

II

That said state regulatory commissions and boards, in the exercise of their respective jurisdictions, are necessarily subject to such limitations upon state authority as are imposed by the Constitution of the United States, and by laws enacted by Congress in consonance therewith; that the jurisdiction granted by the Congress to the Interstate Commerce Commission as respects construction and abandonment of lines, by paragraphs (18) to (22) of Section 1 [fol. 154] of the Interstate Commerce Act, as amended by Transportation Act, 1920, is by paragraph (20) made exclusive of jurisdiction by state authorities; that to the extent, therefore, that Congress has granted to the Interstate Commerce Commission jurisdiction as respects new construction by interurban electric railways, the jurisdic-

tion of state authorities over the same subject matter has been destroyed.

III

That as respects the construction and abandonment of interurban electric railways, however, Congress in said paragraph (22) expressly withheld jurisdiction from the Interstate Commerce Commission, leaving the jurisdiction of state authorities undisturbed, except only as to interurban electric railways operated as a part or parts of a general steam railway system of transportation.

IV

That the order of the Interstate Commerce Commission, which is sought to be set aside and declared void in this proceeding, was made by said Commission in the assertion of jurisdiction to control and restrain the construction of new lines of electric railroad by the Piedmont & Northern Railway, which company is an interurban electric railway, not operated as a part of any general steam railway system of transportation, and as such is expressly withhheld from the jurisdiction of said Commission, as respects the construction of new lines and the extension of existing lines, by said paragraph (22) of Section 1 of the Interstate Commerce Act.

V

That the aforesaid assertion of jurisdiction, as respects the construction of new lines, over said Piedmont & Northern Railway Company, was made by said Commission upon the ground that the functions of said carrier and its methods of operation do not differ materially from those of a steam road, except in the use of electric power, and notwithstanding the fact, as found by said Commission, that it performs an ordinary interurban passenger service, with [fol. 155] all the characteristics of such service, and notwithstanding the fact, as disclosed by evidence before the Commission, that the operating methods of the petitioner are like those of other interurban electric lines, and that its methods of operation, both as to passenger and freight service, present many essential characteristics which mark it as falling within the class of carriers ordinarily designated as interurban electric railways.

VI

That if said paragraph (22) shall be construed in such manner as to sustain said order, and the jurisdiction of said Interstate Commerce Commission, asserted as aforesaid, the jurisdiction of the several states, and of said state regulatory commissions and boards, as respects the construction of new lines and extensions of existing lines, as to all carriers of the same classes said Piedmont & Northern Railway Company, will be destroyed; and that hence said state regulatory commissions and boards, and your petitioner, as composed of the officials constituting the same, have an interest in the construction to be placed on said paragraph.

VII

That by reason of its interest aforesaid, your petitioner duly filed an intervening petition in the proceeding before the Interstate Commerce Commission, in which the aforesaid order of said Commission was made, and was duly admitted as a party to that proceeding, and took part therein; and that, as a party to that proceeding, it has an interest in this proceeding, and a right to be admitted as a party hereto, under Section 212 of the Judicial Code, and in accordance with the principle laid down by the United States Supreme Court in Baltimore & Ohio Railroad Company et al. v. United States, 264 U. S. 258, 267.

VIII

Your petitioner attaches hereto the petition which it desires to file as an intervenor herein.

Wherefore your petitioner prays that it may be per-
[fol. 156] mitted to intervene herein, and to file its petition aforesaid, and that it be made a party hereto, with the right to receive all notices hereafter served upon parties, and to be represented by counsel, and to be fully heard.

National Association of Railroad and Utilities Commissioners, by John E. Benton, General Solicitor of said Association.

Duly sworn to by John E. Benton. Jurat omitted in printing.

[fol. 157] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENING PETITION OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

To the Honorable Judges of the District Court of the United States for the Western District of South Carolina:

The National Association of Railroad and Utilities Commissioners respectfully represents:

I

That it is a voluntary Association which includes in its membership the members of the Corporation Commissions, Railroad Commissions, Public Service Commissions and other regulatory commissions and boards of all the several states of the United States, except the State of Delaware, which has no commission; and that practically all of said commissions and boards, under the laws of their respective states, exercise jurisdiction over common carriers, and particularly over interurban electric railways; and that many of said commissions and boards exercise jurisdiction over such interurban electric railways with respect to the construction of new lines and extensions of existing lines.

II

That this action involves the construction of paragraph (22) of Section 1 of the Interstate Commerce Act, and the determination of the extent to which the jurisdiction of the several states and of their duly authorized regulatory commissions and boards was preserved over electric railroads of the class which embraces the Piedmont & Northern Railway Company by said paragraph, and that by reason thereof your petitioner has an interest herein.

III

That the order of said Interstate Commerce Commission, [fol. 158] which this action was brought to set aside, was made in the assertion of jurisdiction expressly withheld

from said Commission by said paragraph (22) of Section 1 of the Interstate Commerce Act, and is void.

IV

That said order was made by said Commission in the assertion of jurisdiction to control and restrain the construction of new lines of electric railroad by the Piedmont & Northern Railway, which company is an interurban electric railway, not operated as a part of any general steam railway system of transportation, and as such is expressly withheld from the jurisdiction of said Commission, as respects the construction of new lines and the extension of existing lines, by said paragraph (22) of Section 1 of the Interstate Commerce Act.

V

That the aforesaid assertion of jurisdiction, as respects the construction of new lines, over said Piedmont & Northern Railway Company, was made by said Commission upon the ground that the functions of said carrier and its methods of operation do not differ materially from those of a steam road, except in the use of electric power, and notwithstanding the fact, as found by said Commission, that it performs an ordinary interurban passenger service, with all the characteristics of such service, and notwithstanding the fact, as disclosed by evidence before the Commission, that the operating methods of the petitioner are like those of other interurban electric lines, and that its methods of operation, both as to passenger and freight service, present may essential characteristics which mark it as falling within the class of carriers ordinarily designated as interurban electric railways.

Wherefore your petitioner prays that said order may be adjudged null and void and set aside.

National Association of Railroad and Utilities Commissioners, by John E. Benton, General Solicitor of said Association.

[fol. 159] *Duly sworn to by John E. Benton. Jurat omitted in printing.*

[fol. 160] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING INTERVENTION OF NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

It appearing that the National Association of Railroad and Utilities Commissioners has filed its intervention as a petitioner in the above-entitled cause, pursuant to the act of June 18, 1910 (36 Stat. 539, 543), and,

It appearing that said Association was a party to the proceeding before the Interstate Commerce in which the order sought in this case to be set aside was made.

Now, therefore, it is ordered that the National Association of Railroad and Utilities Commissioners be, and it hereby is, allowed to intervene as a petitioner, and be represented by counsel in this cause.

This 2nd day of October, 1928.

Morris A. Soper, United States District Judge.

[fol. 161] [File endorsement omitted]

[fol. 162] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF EVIDENCE—Filed May 24, 1929

At the final hearing petitioner introduced in evidence duly certified copy of the following letter, to-wit:

OFFER IN EVIDENCE

"Interstate Commerce Commission

Washington, March 8, 1927.

Mr. W. S. Lee, President Piedmont and Northern Railway Co., Charlotte, N. C.

DEAR SIR: You are referred to an exchange of correspondence with Director Mahaffie last December, with reference to proposed extensions of the Piedmont & Northern and the issuance of securities to finance such extensions.

Under our instructions an examination has recently been made of your property and its traffic. As a result thereof and in the light of the fuller information now available, we have concluded that the opinion expressed in the secretary's letter of October 12, 1920, to which you referred, can no longer be relied on. It is our conclusion on the basis of the facts now before us that the Piedmont & Northern is not an electric interurban railway within the meaning of section 1 of paragraphs (18) to (21) or of section 20a, but on the contrary is subject in all respects to the requirements of those sections.

[fol. 163] You are, therefore, advised that before the Piedmont & Northern constructs any extensions to its line or issues any securities it will be expected to file appropriate applications for authority therefor under sections 1 and 20a. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention. In this connection, I desire to call your attention to the opinion of the Supreme Court of the United States in Texas & Pacific Railway vs. Gulf, Colorado & Santa Fe Railway Company, 270 U. S. 266, in which the Court said:

'Paragraph 18 prohibits construction of an extension without obtaining the certificate. Paragraphs 19 and 20 provide that a carrier desiring to construct one may apply for the certificate and prescribe the method of proceeding. Whenever such an application is made, the Commission may pass incidentally upon the question whether what is called an extension is in fact such; for, if it proves to be only an industrial track, the Commission must decline, on that ground, to issue a certificate. A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track.'

Very truly yours, B. H. Meyer, Commissioner."

Petitioner also introduced in evidence a duly certified copy of all the evidence before the Interstate Commerce Commission, upon which the order complained of was based, including all exhibits introduced before the Commission and also petitioner's returns to the Commission's questionnaire.

The following statement omits the evidence before the Commission relating to the issue of public convenience and necessity, and also any reference to the exhibits or to the returns to the questionnaire relating exclusively to that issue, inasmuch as that issue, and the Commission's decision thereon, is not involved in this suit; but it does set forth all the evidence before the Commission upon the issues con- [fol. 164] cerning its authority to require petitioner to obtain from it a certificate of public convenience and necessity authorizing the construction and operation of the proposed lines of railway described in the petition, before undertaking to construct and operate the same, which are the only issues involved in this suit, and states the scope of the exhibits introduced before the Commission and of petitioner's returns to the Commssion's questionnaire in so far as they relate to these issues, so as to enable the court to pass upon and determine said issues. The statement also sets forth all evidence claimed by any party to be material to the issues involved, whether such materiality be conceded by the other parties or not.

Statement of Evidence Before the Interstate Commerce Commission Relating to the Issues Involved in this Suit

Governor John G. Richards of South Carolina stated that the present line of the Piedmont and Northern Railway Company in South Carolina from Spartanburg to Greenwood was completed in the spring 1914; it has been generally understood that the plan of the Company from the beginning was to build an electric interurban railway through the Piedmont Section of the Carolinas from Greenwood and Anderson, in South Carolina, to Winston-Salem and Durham, in North Carolina; that the existing lines of the Company were constructed as a part of this original plan and the proposed construction is essential to the completion of such plan. The section of South Carolina now served by the Company and to be served by the proposed

lines is the most thickly populated part of the State and is the principal manufacturing and industrial section. This [fol. 165] section is rapidly expanding, developing and increasing in population and the indications are that this development will continue more repaidly than ever before. The existing lines of the Piedmont and Northern with its frequent stops, averaging 1.2 miles apart, afford a necessary and convenient service such as can only be afforded by an electric interurban line, have materially contributed to the growth and development of the section; and in order that the development and growth of the territory served and to be served by the Piedmont and Northern may continue unhampered, additional transportation facilities, especially those of the character afforded by the Piedmont and Northern Company and proposed to be afforded by its completed lines, are required.

Governor A. W. McLean made a statement with respect to North Carolina and its need of petitioner's facilities, substantially similar to Governor Richards' statement in respect to South Carolina.

Mr. Sam Blease, Chairman of the Railroad Commission of South Carolina, stated that the section of South Carolina now served and to be served by the Piedmont and Northern Railway is thickly populated and is undergoing intensive and extensive industrial development and growth; the existing lines of the Piedmont and Northern, with frequent stops averaging 1.2 miles apart, furnish necessary and convenient service such as only can be rendered by an electric interurban railway and have materially contributed to the growth and development of the section. Additional transportation facilities, especially of the character afforded by the Piedmont and Northern, are necessary in order that the growth of the territory may continue unhampered. The records of the South Carolina Railroad Commission show [fol. 166] that it was the plan of the Company from the beginning to construct an electric interurban railway through the Piedmont Section of the two Carolinas from Greenwood

and Anderson, in South Carolina, to Winston-Salem and Durham, in North Carolina, and the existing lines of the Company were constructed as a part of its original plan.

A. J. MAXWELL, a member of the North Carolina Corporation Commission, stated that the traffic of the portion of the Southern Railway Company's line which will be paralleled by the proposed construction, is very largely through traffic. The proposed line will be local in character and management and will depend for its life and earnings upon its efficient service in handling local business on its line and on its pick-up and delivery of through traffic having origin or destination on its local lines.

The foregoing statements by Governor John G. Richards, Governor A. W. McLean, Mr. Sam Blease, and Mr. A. J. Maxwell, were not testimony in the cause. The witnesses were not sworn and did not testify under oath and were not cross-examined. These were simply statements made by them at the outset of the proceeding before the Examiner, explaining the reasons which influenced them to intervene in the proceeding on behalf of the applicant.

W. S. LEE, President of the Piedmont and Northern Railway Company, testified that he had been connected with the Company and its predecessors, Piedmont Traction Company and Greenville, Spartanburg and Anderson Railway Company, from their formation, as an executive officer and chief engineer up to 1921 and since that time as president; participated in the organization of the Company and had charge of the construction of its lines; was associated with the late J. B. Duke and other gentlemen interested in its construction.

He became interested in the development of the Piedmont Section of the two Carolinas between 1902 and 1904. In 1905 Southern Power Company was organized by J. B. Duke, witness and others for the development of hydro-electric power plants; it became evident that there was a possibility of making enormous industrial developments in

this section. It soon became evident that while trying to [fol. 167] keep up with the power distribution, it was going to be necessary to include railroad or transportation facilities.

They became convinced that if they could build a high speed electric interurban railway which would connect the various towns and cities of the Piedmont Section, and connect up the street railways that were electrically operated in them, that they could build a system that would be very useful and was very much needed.

They formulated a plan, which was announced to the public about 1910, of securing the various street railways and getting the necessary rights, charters and franchises for the purpose of completing this road. The matter was taken up with the various people along the line of the proposed development; that is, from Greenwood, South Carolina on the South to Durham on the North, connecting the various cities and towns along the line, such as Anderson, Greenville, Spartanburg, Gaffney, Charlotte, Salisbury, Winston-Salem, Greensboro and Durham. They purchased the street railway lines in Anderson; the interurban electric railway from Anderson to Belton, a distance of about ten and a half miles; the Greenville Traction Company at Greenville; and the Electric Railway at Charlotte, N. C., which latter company had many miles of line in the City of Charlotte and several miles extending West which are now used as part of the Piedmont and Northern Railway System; secured franchises, permits and charters and later began, section by section, the building of the lines, and putting them together so as to form the Piedmont and Northern System.

The Winston-Salem street railway was purchased in 1913 or 1914. These street railway systems were purchased for [fol. 168] the purpoe of connecting up these lines.

Exhibit 1 is a map showing the existing lines of the Company and also the new mileage; it shows the railway beginning at Greenwood and extending to Greenville and Spartanburg, with a branch from Belton to Anderson; the proposed line from Spartanburg to Gastonia; the present line from Gastonia to Charlotte and the proposed line from Charlotte to Winston-Salem. A copy of said Exhibit I is hereto attached and made a part hereof.

These lines would not have been constructed or purchased if it had not been the purpose to make them parts of the through line of interurban railway extending from Greenwood to Durham and passing through intermediate points. The acquisition of these properties was for the purpose of completing the whole, and no section was ever separately considered.

It was the purpose to connect with any or all of the trunk lines serving this section, as the proposed system was to gather up freight and give a service that the other carriers could not maintain, due to the type of road being constructed.

A fairly good type of construction of the main line was used with low grades and minimum curvature between cities; with a very high degree of curvature and excessive grades in the cities in order to reach points of manufacture; the road was built as a high speed electric interurban road, and was all DC-1500 volt. If these roads had been built for separate operation and not as part of a through system, nothing like as expensive type of construction would have been used, because in a short line it would have been much cheaper to have spent a little more money for power and not so much for grading, bridges, etc. The Duke Power Company was built from time to time and wherever industry needed power. I had many people in this section discuss with me the question of Mr. Duke becoming interested in their enterprises. The Power Company subscribed to [fol. 169] some industries along its line; most of these securities were subsequently sold; today we have comparatively few of them. With the exception of one property, we purchased very nominal amounts of securities in these industries.

These investments were not made for the purpose of securing traffic for the railroad; most of them were made at places to which we never built or intended building the railroad. The Power Company purchased stock in the following companies: Alice Cotton Mills, Easley, S. C.; Aragon Cotton Mills, Rock Hill, S. C.; Armond Mfg. Company, Mountain Island; this last mill was purchased in connection with water rights on the Catawba River and was afterward entirely destroyed by flood; Adrian Mfg. Company, Mt. Holly, N. C.; American Processing Company, Mt.

Holly, N. C.; Carolina Cotton Mills, Greenville, S. C.; Duncan Mills, Greenville, S. C.; Glenn-Lowery Co., Whitmire, S. C.; Icemorlee Cotton Mills, Monroe, N. C.; Judson Mills, Greenville, S. C.; Norcott Mills, Concord, N. C.; Oakland Cotton Mills, Newberry, S. C.; Poinsett Mills, Greenville, S. C.; Rex Spinning Company, Ranlo, N. C.; Thrift Spinning Company, Paw Creek, N. C.; Victor Monohan Mills, Greenville, S. C.; Westervelt Mills, Greenville, S. C.

Its total investment in these mills was $850,625.00, all of which has been sold.

The Power Company today owns $5,000 stock in Lockmore Cotton Mill, York, S. C.; $20,000 in the Ranlo Company, Ranlo, N. C.; $25,000 in the Myers Mills, Gastonia, N. C.; $1400 in the Industrial Mills, Rock Hill, S. C.; making a total of $51,400. It owns controlling interest in the Republic Cotton Mills, Great Falls, S. C., aggregating $1,588,890. This is the entire stock holdings of the Southern Power Company, other than its controlling interest in the Catawba Power Company and interest in other Duke Companies.

[fol. 170] The Lockmore Mills is on the C. & N. W. and Southern Railways; the Ranlo Mills on the P. & N.; the Myers Mill on the Southern and C. & N. W.; the Industrial Mills on the Southern and the Republic Cotton Mills on the Seaboard.

The Duke Power Company has about 850,000 horsepower capacity; it has transmission lines crosswise of the States of North and South Carolina about 250 miles, and lengthwise about 450 miles; over 3000 miles of high tension lines; the Power Company's output is 1,400,000,000 kilowatt hours per year, and is increasing at the rate of 150,000,000 to 200,000,000 kilowatt hours per year.

Mr. J. B. Duke died in October, 1925; his death made no difference in the growth and development of the Power Company, which is controlled by the Duke Endowment and some of the Duke Trusts.

The income from the $40,000,000.00 securities owned by the Duke Endowment is dispensed to charity to the extent of 80 per cent. 20 per cent of the income must be reinvested in the Southern Power Company. We cannot buy securities in anything but government or state bonds except in Southern Power Company. The Duke Endowment

is a perpetual trust created by Jas. B. Duke during his lifetime. The original trust fund was $40,000,000.00, and it will be increased by an additional $40,000,000.00 from the residue of Mr. Duke's estate.

The Power Company has projected plants ahead until about 1932. It has just reached the construction of the Oxford Shoals plant near Hickory, N. C., and will possibly during the year have to begin construction of another hydroelectric and another steam power station. It will have to put in about one steam plant every year and a half.

It has tentatively located three plants, one between Salisbury and Winston-Salem; one in South Carolina between Spartanburg and Gastonia; and another further down in South Carolina. The first two plants will be located on the proposed new mileage of the P. & N., and will require about 25 or 30 cars of coal per day each, 35 or 40 ton cars.

The Piedmont and Northern Railway was planned after giving consideration to the needs of this section. He intended to design and construct an interurban electric rail-[fol. 171] way and thought he had done so; studied the then present state of interurban electric railways; the specifications for this road were based on the practice up to that time, but they went a little further, ahead of time, and improvements were added; 1500-volt direct current was used while at that time nothing higher than 1200-volts was being used. A complete examination of several electric interurban railways was made, and the information thus obtained was used in formulating the specifications and plans of the Piedmont and Northern. The new mileage is to be built along the same line as the old.

The present sections of the Piedmont and Northern have been operated so as to render interurban service through this territory and it is proposed to operate the new mileage in the same manner.

The industries located in this section demand a quick and complete local service. The section is developing generally, so that you can hardly get out of sight of one industry before seeing another. A flexible transportation service is needed, that operates around sharp curves and over steep grades, and that can give service at all times. The type of interurban electric railway now being operated, and which is proposed to be built, is such as can render that

local service; it can gather up traffic from the various industries and handle it to the trunk lines and thereby reach the through business as well as serve the local business. In building the present lines property was purchased for additional terminals and facilities to serve these purposes.

The P. & N. has working arrangements and contracts with the various steam lines which are now opposing the building of the proposed mileage and if these roads can get together and stop the completition of this line, there is no reason why they cannot strangle to death what the Piedmont and Northern now has.

[fol. 172] Comparing the service rendered by the P. & N. with that rendered by the steam railroads in the same territory, the P. & N. is operating in several cities and towns over the streets and over parts of the electric railway lines which have been purchased; it is able to handle electric locomotives over sharper curves; in fact, practically turns street corners in a city; it can take an electric locomotive inside a building where it is impossible to carry a steam locomotive on account of the smoke, noise and dust. It can reach shippers in places where he does not believe it is possible to put a steam locomotive of standard type.

Exhibit 4 is charter of the Piedmont Traction Company dated January 6, 1910, which was obtained in connection with the plan to construct the interurban electric railroad heretofore described. The charter is for a street railway corporation and was obtained under the general laws of the State of North Carolina. It constructed and later conveyed to the P. & N. the present line between Charlotte and Gastonia.

Exhibit 5 is charter of the Greenville, Spartanburg and Anderson Railway Company obtained March 10, 1910, under the general laws of South Carolina. It acquired by purchase an existing interurban electric railway between Belton and Anderson, constructed the present line between Greenwood and Greenville, and later conveyed both to the P. & N. and became merged with it.

Exhibit 6 is the Piedmont Syndicate Agreement, dated January 10, 1911; James B. Duke, W. S. Lee and others are named as Managers. It recites that it is formed for the purpose of acquiring by purchase or construction or both a system, or a number of connecting or separate lines of railway for the transportation of passengers and to the

[fol. 173] extent permitted by law of freight in the several counties of Durham, Alamance, Guilford, Forsyth, Davidson, Rowan, Cabarrus, Mecklenburg, Gaston, Cleveland, etc., in North Carolina; and York, Cherokee, Spartanburg, Greenville, Anderson, Abbeville, Greenwood, etc., in South Carolina. This Syndicate was formed for the purpose of carrying out the plan of constructing an electric interurban railway such as has been described through the Piedmont Section of the two states; its stock was offered the public along the line and there was a large number of subscribers, a thousand possibly, most of whom lived along or near the projected line between Greenville and Durham. When subscriptions were taken it was explained that the Piedmont Syndicate proposed to build a line of railway from Greenville to Durham and other points on or near that line. It was formed as a matter of convenience to acquire such existing lines and build such new lines as were necessary to carry out this purpose.

Exhibit 7 is the charter of the Piedmont and Northern Railway Company, which was incorporated by Special Act of the General Assembly of South Carolina, approved February 24, 1911, with a capital stock of $5,000,000.00, with power to construct and operate a line or lines of railway to be operated by electricity or other motive power beginning at a point on the North Carolina boundary line and extending through certain Counties in South Carolina to the Georgia line. The condition was imposed that unless the corporation should commence actual construction of its lines in any of the Counties mentioned within ten years from March 1, 1911, all rights to enter such County should expire. Power was given to construct, acquire and operate street railways run by electricity or other motive power. The consolidation of the new company with the Greenville, Spartanburg and Anderson Railway Company and with any [fol. 174] other railway company chartered in any other state through or near which the Piedmont and Northern proposed to pass, was authorized. A copy of said Exhibit 7 is hereto attached and made a part hereof.

Exhibit 8 is an amendment to the charter of the Piedmont and Northern Railway Company by Special Act of the Legislature of South Carolina, approved January 27, 1927, under which the restriction prohibiting construction in any

County, unless commenced within ten years from March 1, 1911, was removed. A copy of said Exhibit 8 is hereto attached and made a part hereof.

Exhibit 9 is traffic contract between the Piedmont Traction Company and Greenville, Spartanburg and Anderson Railway Company and the S. A. L. Railway Company, dated December 9, 1910; this contract specifies that at the time it was the purpose of the Piedmont Traction Company and the G. S. & A. Railway, or their owners, to construct a line from Greenwood to Durham and through intermediate points.

Exhibit 10 is contract between Southern Railway and G. S. and A Railway Company, dated October 10, 1913, in reference to a crossing, and states that the G. S. and A proposes building and operating a line of electric railway from Greenwood, S. C., to Durham, N. C.

Exhibit 11 is contract between G. S. & A. and Southern Railway, dated March 25, 1913, in reference to an underpass, and states that the G. S. & A. has located and under construction an electric railroad from Greenwood to Durham.

Exhibit 12 is contract between Piedmont Traction Company and Southern Railway, dated February 5, 1913, in reference to an underpass at Gastonia, and refers to the double track line of electric railway, with appurtenant trolley wires and superstructure which the Piedmont Traction Company has located and under construction, to extend from Kings Mountain to Mt. Holly, North Carolina.

Exhibit 13 is contract between Southern Railway and [fol. 175] P. & N. Railway, dated November 12, 1914, in reference to a crossing at Greenville, S. C., and states "whereas the main track of the Piedmont Company running between Greenwood, S. C., and Durham, N. C.,"

Exhibit 14 is mortgage given by Piedmont and Northern Railway Company to Farmers' Loan and Trust Company, dated July 1, 1914. At the time this mortgage was executed the existing lines of the P. & N. had been constructed and put in operation; the mortgage covers the existing lines and any which might be thereafter acquired by purchase or construction, and was drawn to cover the lines then built and the ones contemplated to be built; the mortgage secures fifty million dollars of bonds to provide sufficient funds for

the entire line; ten million dollars could be taken down at that time against existing lines, and the remaining $40,000,000 issued as other lines were constructed.

The section of the road between Gastonia and Charlotte was completed and put in operation in July, 1912; the section between Greenwood and Greenville in November 1913; and between Greenville and Spartanburg in April, 1914. The interests controlling the Piedmont and Northern have recently bought the Greensboro, High Point and Salisbury street railway systems.

The plan to construct the line through was suspended because it was not good business to endeavor to sell securities under existing conditions; the plan was merely suspended, but has never been abandoned.

Following the outbreak of the war, he and his associates continued to watch the situation and give consideration to the plans to complete the construction of the railroad as originally designed; in 1916 steps looking to further construction work were taken in spite of the war situation; [fol. 176] surveys and locations were made in 1916; engineers were put on for final location of parts of the road from Gastonia South and also in making surveys for getting out of Charlotte to the North. In 1916 final location between Gastonia and Kings Mountain was made, which is approximately the location now proposed to be used; surveys were made but no final location decided upon between Kings Mountain and Spartanburg; about 1911 a great deal of property had been acquired in Spartanburg for giving an outlet for the road Northward toward Gastonia, and a route was decided upon; practically all of this property has been retained, except a small amount sold to the Southern Railway for double tracking. The exit north from Spartanburg now proposed to be used is the same one which was decided upon at that time. It is proposed to go out of Charlotte northward on the location selected in 1916.

Prior to 1916 he made an investigation for getting into Winston-Salem.

Following the surveys of 1916 it was practically impossible to complete any project requiring the selling of securities, except to sell them at cut-throat prices. The Piedmont and Northern Railway lines were taken under Federal Control and continued under that control until

March, 1920. After Federal Control was removed the physical condition of the road was in bad shape. The financial market was in bad condition and it was not thought prudent to go ahead with the project. From time to time it was thought that construction could be resumed in just a few months, but it was not until the latter part of 1923 or April 1924 that it was definitely felt that the financial market was getting in such shape, to go ahead with the work. At that time further surveys and examinations were begun. Mr. Duke died in October, 1925, and at that [fol. 177] time and for eighteen months prior to his death engineers had been in the field making surveys; locations north of Charlotte had been made and just prior to Mr. Duke's death the matter was practically ready to be proceeded with. His death delayed actual construction work and it was thought better to defer the building of the Piedmont and Northern for a short time until matters connected with his companies could be adjusted.

Cross-examination:

The Power Company has 12 hydroelectric plants on the Catawba River, which together with its steam plants, develop about 800,000 horsepower. The Buck station has 100,000 horsepower; we contemplate building three more large plants of the size of the Buck; these three, together with the Buck, will handle ten or eleven thousand tons of coal per day. The Power Company owns 16 power plants; each of the steam plants of the size of the Duke plant consumes approximately from 2,000 to 3,000 tons a day; the construction of these plants produces quite a tonnage of freight, but after the plant is built the principal tonnage is coal going to supply it.

Southern Public Utilities Company is owned by the Duke Power Company and is a retail power, gas and street railway company operating in North and South Carolina, and owns property at Anderson, Greenville, Greer, Chester and Ft. Lawn, S. C., and Charlotte, Bessemer City, Reidsville and Hickory, N. C., not including the properties recently purchased at Burlington, Greensboro, High Point, Hendersonville and Salisbury, N. C., and Spartanburg, S. C. These plants consume many cars of tonnage per day.

The Mill Power Supply Company, owned by the Duke Power Company, is a purchasing company for the different interests of the Power Company; its capital is $25,000, and it is located at Charlotte. It carries a comparatively small amount of goods; in most cases it controls the freight [fol. 178] traffic on the goods purchased. The Tuckaseege Spinning Company is a small mill at Mt. Holly, bought in order to secure water rights and is owned by the Power Company; the P. & N. gets its traffic. The Superior Yarn Mills is located on the Catawba River near Statesville and was purchased to secure water rights, and is not on the P. & N.

The Duke Power Company owns the Western Carolina Power Company, which latter company owns the Bridgewater Development.

The Duke Endowment owns no stock in the Piedmont and Northern, and if any comes to it, it will come from the residue of Mr. Duke's estate. The American Hardware and Equipment Company, located at Charlotte, is a wholesale hardware and equipment company shipping over the different roads leading out from Charlotte; the Duke Power Company owns a majority of its stock.

The Duke Power Company owns 10,000 shares of stock in the Piedmont and Northern; and the Duke Farms Company 38,320 shares; the capital stock of the P. & N. is about 84,000; those two companies own the controlling shares.

The Duke Power Company owns a set of buildings in Charlotte; they are not warehouses, but are rented to the public for a monthly rental; there is no traffic agreement with the tenants. The Power Company supplies power to possibly 300 cotton mills and enters into a contract with each of these mills; the rates, as well as the form of contract, are approved by the State Corporation Commission.

The Trustees of the Duke Endowment have the right to sell all of the properties owned by it.

The Duke Power Company is controlled by the Duke Endowment, therefore, all of the Power Companies are controlled by the Duke Endowment. All of the proceeds, ex- [fol. 179] cept 20 per cent, go back for investment in the Power Company until the Duke Endowment has doubled the corpus of the trust.

The entire stockholdings of the Duke Endowment, as of May 23, 1927, are 102,000 shares of preferred stock of Aluminum Company of America; 326,026 shares of Duke Power Company; and 7,935 shares of Judson Mills.

As of May 31, 1927, the Duke Power Company owned stock as follows: Western Carolina Power Company, 36,690 shares; Southern Power Company, 53,591; Great Falls Power Company, 56,112 preferred; 141,844.53 common; Wateree Power Company, 155,316; Southern Public Utilities Company, 108,228; P. & N. Railway Company, 10,000; Mill Power Supply Company, 250; Mercantile Development Company, 1,590; Superior Yarn Mills, 5,000; Tuckaseege Spinning Company, 5,000; Carolina Standard Gas Products Company, 1,000; Republic Cotton Mills, 15,412; Judson Mills, 882.

The contract I put in evidence between the Seaboard Air Line and the Greenville, Spartanburg & Anderson Railway, which afterward became the P. & N., was a traffic agreement. By that contract I think we agreed to give the Seaboard our through freight. The 40 per cent, however, did not apply to all traffic from everywhere or anywhere. It applies on certain gateways.

In the past few months our representatives have gone to Salisbury and other points which will be touched by the P. & N. if extended and got a large number of people to sign an agreement that they would give 50 per cent of their freight to the P. & N.

The resolution of the Board of Directors of November, 1926, calling a meeting of the stockholders on December 8th, was the first time that this construction was authorized by the stockholders or Board of Directors, meaning the lines between Spartanburg and Gastonia and between Charlotte and Winston-Salem.

The Directors of the Piedmont and Northern Railway Company and some of their affiliations, are as follows:

G. G. Allen, Chairman of the Duke Endowment and President of the Southern Power Company;

C. C. Armstrong, President of several mills in Gastonia and surrounding territory, Rock Hill and various points; these mills are undoubtedly considerable shippers of freight;

J. W. Arrington, President Union Bleachery at Greenville, S. C., a large bleaching and finishing plant that produces a large amount of freight;

W. E. Beatty, who up to a few years ago was President of the Parker-Chamber Mills, which are large shippers over the Piedmont and Northern and other roads;

L. D. Blake, interested in the management of mills at Belton, S. C., which are large shippers over the Piedmont and Northern;

B. E. Geer, President of Judson Mills at Greenville, and interested in some other mills which are large shippers; he is also one of the Trustees of the Duke Endowment;

C. A. Cannon, President of the Cannon chain of mills, which are the largest producers of towels in the world, and which chain of mills produces a large amount of traffic;

B. B. Gossett, head of mills at Charlotte, N. C. and Anderson, which produce a large amount of traffic;

[fol. 180] J. P. Gossett, President of the Williamston Mills and large mills at Anderson, S. C., which produce a large amount of traffic;

E. F. Green, President of Lockwood Green Company, and head of large mill interests in South Carolina, which produce a large amount of traffic;

C. E. Hutchison, head of mills at Mt. Holly, which produce a large amount of traffic;

J. A. Law, who is interested in the management of certain mills that produce a large amount of traffic;

W. S. Lee of Charlotte, N. C., member of Board of Trustees of Duke Endowment, Vice President and Chief Engineer of the Southern Power Company, and President of the Piedmont and Northern Railway;

R. E. Ligon, interested in the management of mills at Anderson, S. C., which are large shippers, and his management is such that he can undoubtedly influence their traffic;

V. M. Montgomery, President of large mill interests in South Carolina, who can control traffic from these mills, and they ship a lot of freight;

W. S. Montgomery, President of mills at Spartanburg, S. C., and he can control a large amount of freight, and those mills have a large amount of freight;

A. F. McKissick, mill owner and President of Chamber of Commerce at Greenville, S. C.;

J. C. Self, President of large mill interests at Greenwood and adjacent points; he controls a large amount of freight naturally;

J. H. Separk, President of a chain of fine yarn mills in and around Gastonia; he controls a large amount of traffic and freight;

A. W. Smith, President of large mill interests at Greenville, S. C.;

E. A. Smyth, interested in cotton mills; his principal interest now being in mills near Flat Rock and at Hendersonville, N. C.;

J. T. Woodside, a large mill owner, and controls large amounts of freight;

Stewart W. Cramer, who is a very large mill owner; President of a mill not located on line of Piedmont and Northern;

J. T. Collins, Philadelphia, Pa.

Redirect examination:

Exhibit 20 is copy of resolution passed by the Board of Directors November 3, 1926. The meeting of the stockholders was held December 8, 1926, and the Directors were given authority to go ahead with this construction work; at a subsequent meeting of the Directors, authority was given [fol. 181] to apply to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity, if such certificate was deemed to be necessary. From the inception of the road and from time to time the matter of proceeding with construction work had been discussed among the officers and directors, and it had not been considered necessary to get actual authority from the stockholders to proceed until we were ready to proceed.

None of the power contracts of the Southern Power Company have ever referred to the P. & N. Railway; prior to the building of the railroad along the route built, and also along the route projected, we were urged by many people to build the road, and it was thought reasonable to see if they were serious about the matter and we asked them to sign a contract to give us a part of the business, which in most cases they very willingly did.

It is contemplated that bonds will be issued under the mortgage of 1914, which provided for fifty million dollars of bonds to pay for the proposed construction.

When the Duke Endowment was formed, Mr. Duke did not give the Endowment any money, but he put in it 100,000 shares of the stock of the British American Tobacco Company; 75,000 shares of the R. J. Reynolds Tobacco Company; 5,000 shares of the George W. Helme Company. These stocks were sold by the Endowment and the proceeds disbursed under the terms of this Indenture; Six Million Dollars of the proceeds were used for buildings at Duke University.

The list introduced as Exhibit 64 is as follows: "Stocks of Mills Along Lines of Southern Power Company, Owned by J. B. Duke, Between January 1, 1905, and October 10, 1925,—Alpine Cotton Mills, Morganton, N. C., 150 shares; [fol. 182] Amazon Cotton Mills, Thomasville, N. C., Par $10.00, 4,000; Acme Spinning Company, Greenville, S. C., 75; Anderson Cotton Mills, Anderson, S. C., 250; Aragon Cotton Mills, Rock Hill, S. C., 250; Brandon Mills, Greenville, S. C., 250; Chadwick Hoskins Co., Charlotte, N. C., 250; Chiquola Mfg. Co., Honea Path, S. C., 519; Clifton Mfg. Co., Clifton, S. C., 100; Decotah Cotton Mills, Lexington, N. C., 400; Dunean Mills, Greenville, S. C., 250; Durham Cotton Mfg. Co., East Durham, N. C., 298; Durham Hosiery Mills, Durham N. C., 150; Easley Cotton Mills, Greenville, S. C., 205; Erwin Cotton Mills, Durham, N. C., 5,206; Groves Mills, Gastonia, N. C., 750; Inverness Mills Co., Winston-Salem, N. C., 100; Jewell Cotton Mills, Thomasville, N. C., 50; Judson Mills, Greenville, S. C., 7,935; Locke Cotton Mills, Concord, N. C., 2,550; Cramerton Mills, Cramerton, N. C., 300; Loray Mills, Gastonia, N. C., 172; Mooresville Cotton Mills, Mooresville, N. C., 250; Orr Cotton Mills, Anderson, S. C., 298; Pearl Cotton Mills, Durham, N. C., 750; Pickett Cotton Mills, High Point, N. C., 150; F. W. Poo Mfg. Co., Greenville, S. C., 400; Pomona Mills, Greensboro, N. C., 122; Proximity Mfg. Co., Greensboro, N. C., 217; Republic Cotton Mills, Great Falls, S. C., 12,325; Rhodhiss Mills, Rhodhiss, N. C., 1,000; Union Bleachery, Greenville, S. C., 1,040; Victor Monaghan Co., Greenville, S. C., 160; Woodwide Cotton Mills, Greenville, S. C., 113.

The engineers were instructed to tie the projected line in with the street car line at Winston-Salem; this location was not absolutely final; it was definitely determined to go around or through Winston-Salem and connect with the Norfolk and Western; no definite arrangements have been made with reference to terminals at Winston-Salem. The line will go through Salisbury, but its exact location through the city had not been determined; when the sur-
[fol. 183] vey was being made negotiations were pending for the purchase of the street railway properties in Salisbury and since that time these properties have been purchased.

Exhibit 110 introduced by Southern Railway Company is a certified copy of stocks, bonds, etc., belonging to the estate of Jas. B. Duke, deceased, as of June 10, 1927, being Schedule E of the inventory of said estate. This exhibit shows, among others, the following stocks owned by the Duke estate:

Duke Farms Company,	8,320 shares,	valued	at.....	$13,875,929.60
Duke Power Company,	125,904 shares,	valued	at.....	12,590,400.00
Hunter Mfg. & Com. Co.,	4,023 shares,	"	"	402,300.00
Carolina, C. & Ohio Ry.,	7,000 shares,	"	"	547,750.00
British-American Tob. Co. Ltd.,	99,433 shares,	"	"	2,510,683.25
American Snuff Company,	500 shares,	"	"	72,875.00
Alpine Cotton Mills,	150 shares,	"	"	15,000.00
American Spinning Co.,	75 shares,	"	"	18,375.00
Am. Hdwe. & Equip. Co.,	600 shares,	"	"	54,900.00
Dacotah Cotton Mills,	400 shares,	"	"	48,000.00
Durham Cotton Mfg. Co.,	298 shares,	"	"	149,000.00
Kerr Bleaching & F. Co.,	56 shares,	"	"	12,656.00
Buchanon Investment Cor.,	1,000 shares,	"	"	13,086,149.00
Locke Cotton Mills,	2,120 shares,	"	"	245,495.00
Pearl Cotton Mills,	750 shares,	"	"	93,750.00
O'Dell Manufacturing Co.,	100 shares,	"	"	.....
Piedmont Elec. Chem. Co.,	315 shares,	"	"	.....
Rhodhiss Mills Co.,	968 shares,	"	"	121,000.00
Stevens Company,	375 shares,	"	"	41,250.00
Union Bleachery Company,	520 shares (preferred)	"	"	54,080.00
Union Bleachery Company,	520 shares, (common)	"	"	78,000.00
American Machine & Foun. Co.,	3,153 shares,	"	"	606,952.50
Liggett & Myers Tob. Co.	38,280 shares,	"	"	2,869,324.00
R. J. Reynolds Tob. Co.	106,600 shares,	"	"	9,981,475.00
Texas Company,	35,997 shares,	"	"	1,768,352.63
Tobacco Products Cor.,	6,600 shares,	"	"	684,750.00
United States Tobacco Co.,	22,397 shares,	"	"	1,287,827.50

This exhibit shows that of the various cotton mills stock owned by Mr. Duke between January 1, 1905, and October 10, 1925 (the date of his death), shown on Exhibit 64, all

had been disposed of prior to his death except the following:

Alpine Cotton Mills, Morganton, N. C., 150 shares; American Spinning Company, Greenville, S. C. 75 shares; American Hardware & Equipment Company Charlotte, [fol. 184] N. C., 600 shares; Dacotah Cotton Mills, Lexington, N. C., 400 shares; Kerr Bleaching Company, Concord, N. C., 56 shares; Locke Cotton Mill, Concord, N. C., 2,120 shares; Pearl Cotton Mills Durham N. C., 750 shares; Rhodhiss Mills, Rhodhiss, N. C., 968 shares; Union Bleachery Company, Greenville, S. C., 1,040 shares.

None of the stocks purchased by the Power Company were purchased for the purpose of influencing traffic to the P. & N.; he was familiar with some of Mr. Duke's purchases of stock in these industries as many people asked him to get Mr. Duke to take the stock; as far as these stocks were concerned he never heard any mention made in connection with the P. & N. Railroad, or of influencing traffic to it. The Duke Endowment owns a large block of stock in the Judson Mills; this was not acquired for the purpose of influencing traffic to the P. & N.; negotiations for the sale of this stock have been under way for some months, and it is apt to be sold any day.

The warehouses owned by the Duke Power Company are on First Street in Charlotte and cost about $140,000; their rentals amount to 14.05 per cent on the investment. [fol. 185] The property referred to as warehouses owned by the Mercantile Development Company is the building containing the general offices of the Power Company, and also containing warehouses; the Duke Power Company owns 50 per cent of the stock in the Mercantile Development Company and it earns about 12 per cent on the investment; the other 50 per cent is owned by the Latta Estate, which has no connection with the P. & N.

E. Thomason, Vice-President and General Manager of the Piedmont and Northern Railway Company, testified that he was in charge of the operations of the Company and had been connected with it since 1911 as Treasurer. In 1911 Mr. Duke informed witness that he and his associates were to build a railroad from Greenwood to Durham and

requested him to make a report on some preliminary work. Mr. Duke said that considerable information regarding traffic, operating conditions, etc., had been gotten together and he turned it over to Mr. Thomason, including estimates of construction costs, prospective traffic, etc.; among the data was a contract dated December 9, 1910, with the S. A. L. Railway. Mr. Duke told him at the time that the first links to be constructed in the Greenwood-Durham line were to be between Charlotte and Kings Mountain and between Greenwood, Anderson and Greenville, and that the matter of completing the line would be taken up later.

The original property was the Anderson Traction Company, an interurban line eleven miles in length running from Anderson, S. C. to Belton, S. C. and before he came to the property the Anderson Traction Company had been taken over by the Greenville, Spartanburg and Anderson Railway. About March 10, 1911, he attended a meeting of the Piedmont Syndicate in New York and the matter [fol. 186] of constructing the line from Greenwood to Durham was discussed and it was definitely decided to proceed with the construction. The Piedmont and Northern Railway Company had been formed on February 24, 1911, to take over the Piedmont Traction Company and the Greenville, Spartanburg and Anderson Railway, and to complete the through line to Durham. The plan adopted was to construct the road in sections under separate contracts for the various sections. The first section to be constructed at the South was between Greenville and Greenwood for which contract was let on March 20, 1911, and work was promptly begun; at about the same time contract was let for construction of a line from Charlotte to Kings Mountain; the next step was to contract for the portion between Greenville and Spartanburg, contracts for which were made in July, 1912. The line from Charlotte to Gastonia was placed in operation in July 1912; from Greenwood to Greenville in November, 1913, and from Greenville to Spartanburg in April, 1914. While this last work was being done the matter of connecting Spartanburg and Gastonia was taken up. Preliminary work was under way and the plan was to proceed promptly North of Spartanburg. Before contracts were made and the work begun, the War broke out in July and all work was temporarily suspended; study and consideration of the matter was continued and early in 1916

considerable engineering work was done and a location determined upon between Gastonia and Spartanburg. This location was shown by blue prints prepared at the time. Construction work was not continued at that time because, as a result of the War, conditions had become serious in the United States. There was apprehension that the United States might be brought into the War. The Lusitania was sunk on May 7, 1915. All of these things tended to increase the disturbance of conditions, especially with [fol. 187] respect to doing any important work. The Government was discouraging new work; by the fall of 1916 it was out of the question to continue or go ahead with the building; in April the country entered the War, then came Federal Control which tied up everything until 1920. During 1916 considerable work was done looking to letting contracts for the work. When the property was turned back to its owners by the Government on March 1, 1920 it was not in satisfactory operating condition, and the first task was to rehabilitate it. During Federal Control serious disruption had taken place in the traffic arrangements and routings so that when the property was returned there was a serious falling off in traffic; it was necessary to readjust traffic arrangements in order to get back the traffic that had been diverted from the property. However, the matter of resumption of construction was considered, in fact it had continuous consideration in the light of prevailing conditions down to the time when recently it was determined to go ahead. The War had brought about a substantial change in wage levels and material prices; prices had advanced materially and particularly so in relation to traffic and earnings of the property; no one knew how long the high prices would continue, for which reason resumption of the work was deferred; final decision to go ahead was not arrived at until some time in 1925 when it was thought that price levels had become reasonably well stabilized and there was no reason to expect that levels would go back to where they were before the War. In the meantime the property had been rehabilitated physically and its traffic increased.

In 1920 Mr. Duke said that his first task was to complete the line as originally projected. At no time was the project of building to Durham abandoned; on the contrary every- [fol. 188] body connected with the property adhered to the

plan to build the property through just as soon as conditions warranted.

Mr. Thomason said that in 1911 the only portion of the line which had been constructed was the line from Belton to Anderson, which was being operated as a city and interurban line by the Anderson Traction Company, whose stock had been bought by the Greenville, Spartanburg and Anderson Railway Company, which had been incorporated to acquire or build a line between Greenville, Anderson and Spartanburg. At that time there were street railway lines in Charlotte and Greenville and the stock in both of these companies had been purchased by Mr. Duke and his associates; the Greenville Traction Company had been purchased by the Greenville, Spartanburg and Anderson Railway Company and was operated by it until 1913 when it was sold to the Southern Public Utilities Company so that the street railway properties in Greenville and Charlotte are not now owned by the Piedmont and Northern Railway Company, but that company has contracts giving it the right to use the properties of these two street railway companies in connection with the operation of the through line of the Piedmont and Northern.

In April, 1916, a study was made getting the line out of Charlotte to the North and the location then selected is the one now proposed to be used.

Under date of April 25, 1913, Mr. C. R. Capps, Vice-President of the Seaboard Air Line wrote Mr. Thomason that the Norfolk-Southern Railway contemplated building a line into Charlotte which would cross the Piedmont and Northern's proposed line North and suggested that this would be an obstacle to the Piedmont and Northern in constructing its line North; on May 6, 1913, Mr. Thomason replied to Mr. Capps saying that he had made a survey of [fol. 189] two or three lines leading north out of Charlotte but had not settled on any one of them, said that he did not know at that time just when the matter would be taken up again. Early in 1924 Mr. Duke told Mr. Thomason to get the data together and authorized him to say that work would be resumed as soon as the road was gotten in shape and its traffic gotten back to what it had been.

I have already stated that the matter of continuing the line north was always in mind and was frequently given special consideration. During November, 1923, I went over

the proposed line running north from Charlotte with Mr. Duckett, who was then chief engineer of the Piedmont and Northern. I recall several conversations that I had with Mr. Duke regarding the resumption of the work in 1922 and 1923 and 1924. I remember telling Mr. Duke that the directors were agitating the matter of the resumption of the work. Mr. Lee and I were stucing the situation.. Early in 1924 Mr. Duke told me to get the data together as he thought the thing to do was to go ahead. He authorized me to say that we would go ahead as soon as we could get the road in shape and get its traffic back to what it was.

I especially recall that on a trip which I made with Mr. Duke through Virginia and West Virginia in May, 1924, visiting the coal mines there, the subject of the resumption of the work and the building of the line through to a connection with the Norfolk and Western at Winston-Salem was mentioned in a consideration with Mr. Jenks, vice-president of the Norfolk and Western. Mr. Duke stated that we were ready to go ahead and asked whether the Norfolk and Western would cooperate. Mr. Jenks assured him that he would; that we would have the cordial support of that line if we built to Winston-Salem. The matter was mentioned time and time again.

The matter of financing the proposed construction was taken up early in 1924 with bankers in New York, and the consideration of the financial aspects, as well as the matter of construction, etc. have been carried on down to the present time.

The properties of the Winston-Salem Traction Company were bought by the Southern Public Utilities Company in 1913 and their use in entering the city by the Piedmont and Northern has always been contemplated. York and Cherokee Counties are mentioned in the Piedmont and Northern Railway charter as counties where it is authorized to construct a railroad; these counties lie North of Spartanburg and were included so that the line could be constructed North of Spartanburg. In September, 1910, the charter of the G. S. & A. was amended so as to permit its line to be constructed to the North Carolina State line; there was no point in going there except with the idea of going further North. When the contract was let to build from Gastonia to Charlotte, it provided for going on to Kings Mountain but later it was decided to temporarily stop at Gastonia.

The map in the Railway Guide of June, 1927, shows the line of the Piedmont and Northern projected to Durham. This map was inserted in the Railway Guide in 1916 and has been there ever since. It was put there because the line was projected to go to Durham; it was not intended to [fol. 190] give the impression that the line would not go to Winston-Salem. The most important thing was to have it well known that the plans of the Company contemplated constructing through to a Northern connection. It was always in mind that the line would go to Winston-Salem and perhaps the Durham line would connect at some point on the line to Winston-Salem.

He negotiated with the Winston-Salem Southbound to acquire trackage rights enabling the Piedmont and Northern to go to Winston-Salem over that line and if these rights could have been obtained the P. & N. would probably have abandoned the plan to build its own line there, but the Southbound would not permit the use of that line. The Southbound is owned, one-half by the Norfolk and Western and one-half by the Atlantic Coast Line.

The first letter was dated August 28, 1925, and contained the following:

"You have doubtless heard of the movement on foot by the people between Charlotte and Winston-Salem to get Mr. Duke interested in building an electric railway between those points, through the towns of Concord, Kannapolis, Salisbury and Lexington. If Mr. Duke should give favorable consideration to this question, the thought has occurred to me that instead of building a road between Lexington and Winston-Salem that some arrangement might be made with your company for joint usage of your road between Lexington and Winston-Salem and terminals at those points.

"If such an arrangement can be worked out, I feel it would be advantageous not only to the Winston-Salem Southbound but to the Atlantic Coast Line and the Norfolk & Western."

The P. & N. proposed to buy a one-third interest in the Southbound. This was declined and the trackage contract was declined. The proposition was finally declined on February 18, 1927, as shown by the correspondence.

When the map was inserted in the Railway Guide the matter of trackage rights had not been taken up with the Southbound.

Can't say when the line will be built to Durham; the policy of the Company has always been to build step by step. It was decided to go to Winston-Salem at the present time because the mileage North of Charlotte to a connection with a Northern line will handle not only general traffic but coal. The coal consumption in the Piedmont Section has steadily increased in recent years. It is certain, and particularly in view of the plans of the Power Companies to build large auxiliary steam plants, that coal consumption will increase very rapidly in the near future. As the coal tonnage, present and prospective, is increased the desirability, from the standpoint of prompt service and economy, of shortening the route to the Virginia and West Virginia coal fields as much as may be, has growing importance. [fol. 191] The volume of general traffic moving between the Piedmont, North and West is also increasing rapidly.

In deciding upon the type and character of construction of the present mileage, weight was given to the expectation that the lines then to be constructed would become parts of the throughline to a Northern connection. If it had been the plan not to connect Spartanburg and Gastonia, and not to build to a Northern connection, a more inexpensive type of construction would have been appropriate for the mileage now in operation; the same specifications for bridges were used as were used by the Southern Railway on its main line. If the line had been intended to be stopped at Spartanburg much lighter locomotives would have been used than those now operated; when the P. & N. was built it was a higher class line than the Southern Railway main line at that time. It had maximum grades of 1 per cent compensated for curvature at the rate of .04 feet per degree.

The property is electrically operated, as interurban properties customarily are operated. It ties into the street railway systems. Its passenger cars, locomotives and its motor cars are designed to operate where there is a high degree of curvature, as in cities. It makes frequent stops, averaging 1.2 miles apart, considering always the purpose of rendering the best local service. Its passenger cars are motivated by self-contained motor units. The type of

construction of the line is that of the standard interurban. Power is furnished by overhead trolley. The rails are bonded for return circuits. Cars and locomotives are so constructed as to operate over curves with a fifty foot radius, making it possible to make the right-angle city turns.

Passenger cars are lighted in series from the trolley; they are equipped with radial draw bars, enabling them to turn sharp curves and making them unacceptable on steam [fol. 192] lines. Only its box cars and automobile cars are suitable for exchange with steam lines.

The personnel is similar to that on other interurban lines, such as motormen, conductors, and electrical workers, and is largely recruited from street railway companies. Frequent passenger service is maintained over all lines, there being stops at such frequent intervals as are appropriate in urban and interurban service.

Freight traffic is hauled by electric locomotives having various tonnage ratings, designed to serve local conditions, as they vary on different portions of the lines. These locomotives were purchased and are adapted for use only under the particular circumstances and conditions of traffic prevailing on applicant's property, or some similar interurban electric railway. The electric locomotives are unfit for a line with a long haul, heavy load traffic, such, for instance, as the Virginian Railway with its electric locomotives moving coal to Tidewater.

In the dispatching of trains, there issued a selector system designed for throwing the semaphore boards so that untrained men will not overlook their orders. Such operating practices are not in use by steam railroads.

The cars and locomotives of the company were specially designed for the particular interurban conditions that prevail on the property. A 1500 d. c. voltage is used on the mileage between cities and at certain places in cities. The voltage in use by the street railways on the streets in the cities is about 600. There is a switch arrangement on all locomotives and cars, so that the voltage is reduced, as the immediate condition requires, from 1500 to 750, which will operate over the 600 volt line. Such practice is followed in [fol. 193] Charlotte, Greenville, Anderson and will be followed in Winston-Salem.

The applicant's project serves cities in which there are electric street railways operated by the Southern Public Utilities Company, a corporation controlled by the same interest which controls the applicant. These street railway systems are located in Charlotte, Winston-Salem, North Carolina, Greenville and Anderson, South Carolina, and over them applicant has trackage rights.

In the city of Gastonia, the applicant itself owns and operates the street railway system. The electric interurban railway of the applicant is the transportation facility by which the street railway lines in these cities are connected with each other. The cars and locomotives that handle the traffic of the applicant at and through Charlotte and Gastonia operate over the street railway lines of those cities, and become in effect, street railway facilities by virtue of the special design of cars and locomotives and the change of voltage.

Freight traffic is handled in cars that move through the streets of the cities and around the curves of a higher degree of curvature than those on which a standard railroad usually operates. While the locomotives are designed so that they can operate upon the city streets and handle freight traffic over the street car lines, it is not the thought to move the bulk of through freight traffic over the city street car lines. As a matter of convenience additional lines will be used in and around the cities to handle the bulk of such through freight. The urban operation in cities facilitates the interurban operation between the cities, and the connections with the street railway lines affords important facilities for furnishing the most satisfactory local service. The street railway lines are used largely for delivery and pick up service in the cities. The present manner [fol. 194] of operations will be continued on the completed lines. Passenger traffic is about 8% and freight traffic about 92%. Passenger traffic has shown a gradual decrease in relation to freight. This is very largely accounted for by the introduction of the automobile and the busses which operate over the splendid system of hard surface roads which have been constructed in North Carolina during recent years. It is also due in part to the increase of freight traffic which has taken place during the period of decreasing passenger traffic. The proposed construction will increase very largely both the freight and passenger traffic.

It should result in recovering back for the property heavy passenger traffic now hauled by the automobiles and busses. By the existing schedules it takes a minimum of three hours and twenty-seven minutes to go by rail from Winston-Salem to Charlotte; under our schedule the trip will be made in two hours and twenty minutes.

Our estimate indicates that the increased revenue after completion through to Winston-Salem will for the first year be $3,890,016.57, and that for the succeeding five years it will increase each year 8.4 per cent over the preceding year, resulting as follows: Second year, $4,216,777.96; Third year $4,570,987.31; Fourth year $4,954,950.24; Fifth year $5,371,-166.05; Sixth year $5,822,344.01; with substantially the same basis of increase thereafter.

New industries will be constructed on the line and much new traffic will develop at all points. The Power Company has plans for a steam power plant between the Yadkin River and Winston-Salem, which will use approximately 3000 to 3600 tons of coal per day. A second plant is calculated to consume between 3000 to 3600 tons of coal per day. The average of coal cars is about 70 tons; they run up as high as 100 tons. The figures as to the quantity of coal to be used were given by the Engineering Department [fol. 195] of the Power Company. I believe the construction will benefit the Clinchfield and its shippers, and will open a new route for Clinchfield coal moving East from Spartanburg to points on the Piedmont line; will enable the Clinchfield to become a link in a very high class short line, efficient through route from the Piedmont Section to the middle West. It will substantially increase the volume of coal consumed in the Piedmont and broaden the market for coal available to the Norfolk and Western producers in Virginia and West Virginia. It will open a new route to the North and West by the N. & W. into and through the Piedmont territory. It should be of great service to shippers because of improved service it will afford between the Piedmont Section and the N. & W. The Georgia and Florida comes into Augusta and is now building to Greenwood where it will naturally connect with our line; I think the officials of this road were correct in believing that it will derive great benefits from a connection with the P. & N.; I would think this connection at Greenwood with the G. & F. would be greatly beneficial to the Clinchfield.

The securing of a connection with the P. & N. was one of the desirable features mentioned by the Commission in granting the application of the Georgia and Florida for its extension from Augusta to Greenwood. The construction will strengthen and benefit the S. A. L. with respect to its fuel supply and high class traffic moving from the Southeast to territory, say West of the Buffalo-Pittsburg line. I believe it will vastly improve the service and will shorten the time of shipments to and from the Central Freight Association territory via Spartanburg by one day, and via Winston-Salem by one or two days.

[fol. 196] The P. & N. is dependent for an outlet upon the Southern, the Seaboard, Charleston and Western Carolina, and the Carolina Clinchfield and Ohio, the railroads now seeking to prevent its expansion; these railroads compete locally with the Piedmont and Northern; a connection at Winston-Salem with the Norfolk and Western will make the Piedmont and Northern independent of these lines in reaching the outside world.

The strictly bridge traffic of the Piedmont and Northern is very light, approximately 2 per cent; it is hoped that the proposed construction will increase this, however it is expected always to be of minor importance as compared with traffic which originates on or is destined to points on the Piedmont and Northern. In this respect it differs from the conditions on the main line of the Southern Railway through the Piedmont Section, which is the middle portion of a large system necessarily carrying bridge traffic very much in excess of the traffic which originates or is destined to points in this territory. This preponderance of bridge traffic necessarily affects the local service rendered on that mileage and prevents the same prompt and flexible service as is possible on the Piedmont and Northern with its relatively low percentage of bridge traffic.

It has been the opinion of the officials of the Piedmont and Northern that it was not necessary to apply to the Commission for a certificate of public convenience and necessity because it is an electric interurban railway not operated as a part of a steam railroad system, and because the construction had been begun prior to the time when the Transportation Act went into effect and the work is merely a resumption of the work theretofore begun. The Com-

mission has never treated the Piedmont and Northern as subject to the Valuation Act; it is governed by the Com-
[fol. 197] mission's accounting rules governing electric railroads and not those governing steam railroads; the former Railroad Labor Board ruled specifically that it was an interurban electric railroad, not a part of a steam railroad, and therefore not subject to the jurisdiction of the Labor Board; the Commission under date of October 12, 1920, also made an informal ruling that it was not subject to the Transportation Act governing the issuing of securities; for these reasons steps looking to the completion of the work have been taken without applying to the Commission.

The tables I have prepared show that in 1915, the first full year of operation, the Piedmont and Northern earned from freight traffic $4,413.00 per mile; the Southern Railway on all lines in North and South Carolina received from the same source $5,754.00 per mile; the Seaboard Air Line $4,613.00; and the Atlantic Coast Line $4,492.00.

For the year 1926 these figures were:

Piedmont and Northern	$17,891.00
Southern Railway	16,725.00
Seaboard Air Line Railway	12,390.00
A. C. L. Railway	13,790.00

The percentage increase of Piedmont and Northern was 305.41; of the Southern Railway, 190.67; of the Seaboard Air Line Railway, 168.59; of the Atlantic Coast Line Railway, 206.99.

Cross-examination:

Z. V. Taylor was President of the P. & N. in 1920.

Exhibit 115 is a certified copy of Pages 278 to 284, transcript of oral argument held November 29, 1920, at Washington, D. C., before the Commission in Case No. 11,774 South Carolina Fares and Charges. This Exhibit was introduced by the Southern Railway and is as follows:

EXHIBIT No. 115

"Argument of Mr. Z. V. Taylor in Behalf of Piedmont and Northern Railway Company

"Mr. Taylor: Mr. Chairman, and gentlemen. I shall not attempt to make any argument upon the general principles

underlying this case, for the reason that it has been so elaborately argued by Mr. Rixey, but I shall address myself solely—except perhaps incidentally—to the idea that any order that is issued here should comprehend and include the Piedmont and Northern Railway Company. I would not have thought that necessary but for an expression that appeared in your last order, in the Illinois case, I am not attempting to get you to unsay anything that you said in that case, but I want to point out, if I may, facts and circumstances which make the expression in that case inapplicable here.

"In the first place, the Piedmont & Northern Railway Company is an electrically operated railroad in that it employs electric locomotives instead of steam locomotives, and that is the only distinction between it and the steam roads.

"Commissioner McChord: Have the electric railroads been heard in this proceeding?

"Mr. Taylor: No, sir, they have not, as I understand it. In the Illinois case, as was pointed out to me this morning, [fol. 198] when I came here in response to a telegram, it was said that while they were parties to that petition, they were not allowed, in that particular order, to participate in the increase, but that the question was held in abeyance.

"In this case before us, we are parties to this petition. We are interstate carriers in the fullest sense of the word. We were taken over by the Government and operated as a part of the Government's properties. Sixty-five per cent of our business is interstate business. We load cars from our stations on through bills of lading, through cars to the Pacific Coast, and we are in direct competition with the trunk lines in the South, not only for interstate business, but for intrastate passenger business.

"Now, Mr. Chairman and gentlemen of the Commission, we have a line of railway running from Spartanburg, in the State of South Carolina, to Greenwood, a distance of approximately 90 miles. Paralleling that line of railroad is the Southern Railway, so that if we were not included in this petition when the raise is granted in this petition, and the petition was allowed except as to us, we would be paralleling the Southern Railway that distance and cutting their rates.

"In addition to that, the Seaboard Air Line and the Southern Railway compete for business from South Carolina into points north, notably Washington, New York, and Boston. Interstate passengers going, we will say, from Greenwood, S. C., would take our line for 90 miles, paying 3 cents per mile, and then would take the Southern at 3.6 cents; whereas, if they desired to travel by the Seaboard Air Line, for the entire distance it would be 3.6 cents per mile. A passenger out of Charlotte, N. C., would go more than half the distance at 3 cents by splitting his journey, whereas, by buying an interstate ticket, it would be 3.6 cents.

"Now, in every definition under the Transportation Act defining a common carrier and placing the jurisdiction with this Honorable Commission, we are included. I have in mind here just one, to which I will call the attention of the Commission. In providing for guarantees, the term "carrier" means a common carrier by railroad, or partly by railroad and partly by water, whose railroad or system of transportation is under Federal Control at the time Federal Control terminates, or which has heretofore engaged as a common carrier in general transportation, and competed for traffic, or connected with a railroad at any time under Federal Control, and a sleeping car company. But it does not include a street or interurban electric railway not under Federal Control at the time Federal Control terminates, which has as its principal source of operating revenues urban, suburban or interurban passenger traffic. That, we do not have. So, under that definition, we are clearly included, due to the fact that 65 per cent of our business, as I say, is interstate business.

"The railroads, as I understand it, in the Illinois case, fell directly within this definition. Their principal business was interstate passenger business. This Act defines, for different purposes, the term carrier, and makes different definitions for different purposes. But, for the purpose of regulating the rates of a competitor in interstate business, [fol. 199] this Act most clearly places under your jurisdiction a line of railroad engaged in interstate traffic, whatever its motive power may be, provided its principal source of revenue is interstate traffic, as ours is.

"If the Commission please, in my opinion there would be every reason in the world, and certainly the same reasons for excluding in any raise the electrically operated portion of the Chicago, Milwaukee & St. Paul, as there would be for excluding us. The same reasoning would apply to the Norfolk & Western, the undisputed and indisputable fact being that we are a railroad competing for interstate business, 65 per cent of our revenue being derived therefrom. We are a class one railroad, under your definition of the classifications of railroads, and the only difference between us and any steam railroad operating in this country is the fact that we employ an electric locomotive, which the steam railroads some day must come to, instead of a steam locomotive.

"To exclude us from this order would allow the Seaboard Air Line an advantage over the Southern Railway in interstate passenger business through our lines, or the Southern Railway an advantage over the Seaboard, as the facts might appear.

"Commissioner Eastman: How long is your road?

"Mr. Taylor: It is about 100 miles.

"Commissioner Eastman: What is its financial condition?

"Mr. Taylor: Perfectly sound.

"Commissioner Eastman: Are your earnings at a reasonable level now?

"Mr. Taylor: Not yet, but we hope they will be under this order (laughter).

"Commissioner Eastman: How far short of it are you now?

"Mr. Taylor: About $140,000. You can conceive what a competitor we would become to these trunk lines, because between these points, with this advantage, our interstate business would cut into theirs very materially at these local points. You can conceive what a serious competition this is when I say to you that our gross revenue from passenger earnings is over $6,000 per mile of railroad.

"Commissioner Eastman: What I mean is this. Suppose we were looking at this from the standpoint of your road alone. Could you make out a case for an increase in rates on the ground that you are not having a reasonable return on the property now?

"Mr. Taylor: Unquestionably we could, sir; and under the authority of the Transportation Act, which contemplates your body acting as you have acted in Ex Parte 74, all of our calculations for a reasonable return, under the strictest operating economies, contemplated this increase. When I said we were sound, I meant we owed no debts that were pressing us. We are not earning a reasonable return upon our investment, but we are earning the interest on our bonds, being bonded very low per mile. We contemplated that this Ex parte 74 would help us just as it did our competitors, the steam railroads, and this Act, as I have endeavored to point out, clearly comprehended us. The exclusive terms applied in that Act do not apply to us, but applied to interurban railroads whose principal [fol. 200] business was the carriage of intrastate passengers, or the revenues received from light and power.

"Commissioner Hall: What proportion of your revenue is from freight traffic?

"Mr. Taylor: About 65 percent, sir, and 90 per cent of that is interstate."

Freight traffic of the P. & N. is now about 92 per cent, and about 80 per cent of that is interstate traffic and about 12 per cent intrastate traffic.

In 1926 the P. & N. handled 72,000 cars in interchange. We had at one time a regular Pullman schedule with the Seaboard. My present estimate is that with the proposed line built we will handle 85,000 cars per annum in addition to the 72,000 now handled. Of the total of 157,000 cars, approximately 26,000 will be coal and coke.

The balance of the 157,000 cars would be made up of grain, packing house products, fruits and vegetables, building material, cotton and waste, sandstone, merchandise, etc., largely from the East, West and the Southeast.

The Duke Power Company has a steam plant at Greenville, S. C., which is on our line, on the Southern, and on all the other lines at Greenville; the next steam plant is at Duncan which is a smaller plant; the Greenville and Greensboro plants are smaller plants. When the new lines are built I don't think the coal down there (in S. C.) will be handled differently from what it is now unless it would be

"distress coal." The next steam plant is at Mt. Holly and its coal is handled by the P. & N. and will continue to be handled by it if the new lines are built; the next plant is at Salisbury which is a much larger one and I assume the Southern hauls it now; if the new lines are built coal for it will be handled by the P. & N. because it was put there by Mr. Duke's instructions that his railroad would be [fol. 266] built by that point, his instructions being that the steam plant was to be put there so that it would comply in with the P. & N. which would get the freight. The next steam plant is at Greensboro; it is a small plant and I think is served by the Southern.

I heard Mr. Lee testify about the steam plants projected; one of them to be built between the Yadkin River crossing and Winston-Salem; the P. & N. would handle coal to that plant.

If we build the lines, we will have a through Southern route by the Georgia & Florida into Florida and all the other roads we connect with, and would have a through route from Florida on through the North and West. I would not say absolutely that is what we want; that was one of the things that prompted going ahead with the railroad and to protect our situation against the roads that are now opposing us. I have had no arrangement and had nothing to do with the Georgia & Florida; I had no correspondence with them and they have not corresponded with me.

The P. & N. has 325 box, automobile, flat dump and all cars. Some of these interchange with the other roads and some do not. Not all of the 82,329 cars of additional business the first year would be taken from our present connections; there would be included local business and any new industrial business that would be located on this line; the balance would be drawn from other lines and some would come from our old line.

We expect that approximately 15 per cent of the new business will be overhead traffic,—that is traffic which originates and is destined beyond the line of the P. & N.

He said that he did not think he discussed with Mr. Duke the question of taking up with the Winston-Salem South-

bound the matter of trackage rights; he would not have attempted to settle the matter without referring it to Mr. [fol. 202] Duke and the Board of Directors. The construction of this line to Winston-Salem was decided on prior to 1925, definitely decided upon—it was not definitely decided upon, he would not say. Mr. Duke said he would go ahead, but it had to be submitted to the Board of Directors before it was definitely settled. The letter of August 28, 1925, to the Winston-Salem Southbound refers to the movement on foot by the people between Charlotte and Winston-Salem to get Mr. Duke interested in imbibing an electric railway between those points, and asked if some arrangement might be made for the joint use of the Winston-Salem Southbound tracks between Lexington and Winston-Salem if Mr. Duke should give favorable consideration to the proposition. The people in this section were always pushing Mr. Duke and the other officers of the Company on the question of the projection. The letter of February 2, 1927, stated that it had been definitely decided to extend the lines of the Piedmont and Northern, and that it was desired that negotiations for the joint use of the tracks of the Southbound be renewed. The letters between the Piedmont and Northern and the Southbound correctly state the facts so far as they were written by me.

In answer to the questionnaire filed with the Commission it is stated on page six: "Applicant's line when completed will afford to this section a much needed local and switching service and local passenger service with frequent stops that is not generally supplied by standard steam railroads; will supply elastic and flexible transportation facilities between cities and towns and industrial centers in the Piedmont Section of North and South Carolina, and also form connections with carriers reaching outside territory." The questionnaire was verified by the witness, and he was giving [fol. 203] the Commission his opinion as to the purposes and functions which would be subserved by this line. All of those functions are important in serving this section of the country, and one could not stand alone without the other. Both the local passenger service and the freight service are needed, but the freight service probably would predominate. The local service of the Piedmont and Northern is its main contribution to the public.

According to the map in the Official Guide the proposed line of the Piedmont and Northern runs about 20 miles South of Winston-Salem..

In running freight trains from Greenwood to Winston-Salem they would not pass over the streets; through traffic, in a large measure, would not go over the streets, not any of it to any extent. At Charlotte and other places we diverge from the street car line and come into the City over the street car line; it would not be necessary to operate through freight cars through Charlotte and Winston-Salem streets. We would use the local street railway at all of the towns in connection with the outside lines for pick-up and delivery service.

John Arrington, Operator of a bleachery at Greenville, South Carolina, testified that his plant is located about four miles from Greenville, not immediately on any Railroad, but has a sidetrack served by all of the railroads; the service rendered by the Piedmont and Northern is more expeditious than that rendered by the steam roads; he has recently gotten up a memorandum of a dozen or more different shipments from competitive and non-competitive points for the purpose of comparing the service rendered by the different roads; the information was taken from freight bills, which were not hand picked, but taken at random.

The first half-dozen instances are from Southern Railway [fol. 204] local points to Greenville, to-wit: Clearwater, S. C., 203 miles, 6 days; From Easley, S. C. 12 miles, 3 days; Bath, S. C., 200 miles, 6 days; Graniteville, S. C., 195 miles, 8 days; Gaffney, S. C., 52 miles, 5 days; Lexington, N. C., 169 miles, 5 days; Rock Hill, S. C., 100 miles, 6 days.

The next half dozen are shipments received over the Charleston and Western Carolina, as follows: From Tarboro, N. C., which is not on the C. & W. C. but is delivered to us by them, 308 miles, 2 different shipments, each 11 days; Woodruff, S. C., local point on the C. & W. C., 53 miles, 4 days; Enoree, S. C., 49 miles, 6 days; Great Falls, S. C., which is in combination with the S. A. L., and C. & W. C., 132 miles, 2 shipments, each 8 days; Simpsonville, S. C., a local point, 13 miles, 2 days.

Shipments received over the Piedmont and Northern competitive points are as follows: Williamston, S. C., 18 miles, 2 shipments, each received over night; Pelzer, S. C., 17 miles, over night; Greenwood, S. C., 58 miles, over night; Piedmont, 9 miles, delivered over night.

J. S. Cureton, Traffic Manager of P. & N. testified:

He has personal knowledge of the service furnished by his road; it is different in character from that furnished by steam railroads; as to passenger service, the trains make more frequent stops than the steam trains; 49 passenger trains are run daily on various parts of the 128 miles of line; there are 106 stops where passengers are taken on or let off. Between Greenwood and Belton, 31 miles, three trains are operated each way per day by the P. & N., making when necessary 63 stops. The Southern runs two passenger trains each way, making ten stops. Between Belton and Greenville, 26 miles, four trains a day are operated each [fol. 205] way, making 72 stops; the Southern runs one train a day each way, making eight stops. Between Greenville and Spartanburg, 32 miles, four passenger trains are operated each way a day and an additional one each way on Saturday, making 120 stops. The Southern Railway operates eight passenger trains a day, making 20 stops. Between Gastonia and Charlotte the P. & N. runs four trains each way daily and makes 72 stops and the Southern runs eight trains and makes 14 stops. Of the Southern passenger trains between Greenville and Spartanburg and between Gastonia and Charlotte, there are only three in each direction which are considered local trains, the others making few stops and being for the accom-odation of through passengers. He has personal knowledge of the operation of freight trains on the P. & N. and of the character of service furnished. The frequent operation of freight trains in small units has been the foundation of the freight traffic growth; eighteen freight trains a day on the 128 miles of road are operated virtually rendering switching service all over the lines. The average number of freight cars to the train is 14 loads and six empties, permitting rapid switching and movement; all trains set out and pick up cars all

over the line; this kind of service will be given on the proposed mileage.

He had had compiled a list of movements of cars from the P. & N. yards for delivery to consignees and similar movements of cars from the Southern Railway yard during the first four months of 1927. This covers 283 cars delivered from the Piedmont and Northern to the Southern Railway for delivery to consignees, on its line, and 183 cars handled from the Southern to the Piedmont and Northern for delivery to consignees on the P. & N. at Charlotte; 674 cars handled from the P. & N. to the Southern for delivery to [fol. 206] consignees on the Southern and 100 cars handled from the Southern to the P. & N. for delivery to consignees on the P. & N. at Greenville. This list shows a very much quicker delivery by the P. & N. to consignees on its lines than by the Southern to consignees on its lines. A large number of similar instances could be cited to show that the methods of operation of the P. & N. permit more rapid handling of shipments than on the steam lines. A study of a large number of shipments shows that the P. & N. can and does handle less than carload shipments with greater dispatch than the steam lines and numerous instances of shipments to sustain this statement were cited.

Cross-examination:

He considers the Piedmont and Northern Railway as an interurban railroad plus; it performs all the characteristic service of an interurban railroad and equals that of the standard railroads in other respects; the extension of the line as proposed will not change the character of the service in the least and it will continue to be primarily an interurban railroad, and this would be true if it were extended to Durham. If the road is built from Greenwood to Winston-Salem as proposed, it will be approximately 240 miles long.

I have made no study between the P. & N. and other electric interurban railways. I do not know whether the distinguishing characteristic of an electric interurban railroad is the dominance of local and interurban passenger traffic. I do know that the passenger, baggage and express traffic do not predominate on the P. & N. Essentially and in the large, the P. & N. is a freight carrier, and it is from freight that it gets its revenue, and that is the source it expects to

get its revenue from when extended. The great majority of freight on the P. & N. is interstate.

Interstate freight as we handle it is local in character, in that the service performed at the delivery and the initial points is purely local. To us we do not distinguish between the handling of interstate and intrastate traffic for the reason that it is a purely local traffic with us, whether it goes off our line a short distance or whether it stays on the line. Therefore, the distinction as to interstate traffic would not apply in the same way to the Piedmont and Northern as it would to longer lines. The reason I say that a large part of our traffic is local is because of the comparatively restricted scope of the length of our line.

Interstate freight as handled by the P. & N. is local in character in that the service performed at the delivery and the initial points is purely local, that is, the freight carried is local freight, as well as that which stays on the lines of the P. & N. The reason I say a large part of our traffic is local is because of the comparatively restricted length of our line; sixty per cent of our freight traffic is interchanged with other carriers; the majority of that moves across state lines, though there is a great volume moving within the [fol. 207] state; I am viewing the whole traffic from the standpoint of the function performed by our line; sixty per cent of our freight is interchanged with other carriers; the P. & N.'s freight cars are interchanged with other railroads. Last year we handled 72,886 loaded cars initially. I would say from my knowledge and belief that the great proportion of the traffic that is carried over the Piedmont and Northern Railroad is carried in the rolling stock and equipment of other standard railroads.

The P. & N. belongs to the Per Diem Association; the number of cars belonging to other companies used by the P. & N. is largely in excess of the number owned by it; the P. & N. belongs to the Southern Freight Association and American Railway Association, the Southern Weighing and Inspection Bureau and Southeastern Demurrage Association; I don't know of any other electric interurban railroads that belong to those associations; passenger traffic of the P. & N. has fallen off in recent years due to competition of the automobile and local passenger traffic is becoming of less importance. The competition of the automobile

has been reflected in the passenger revenues of the road; the passenger traffic on the road, as extended, would not support the road.

The traffic which we would expect to handle over the lines as extended, moving up from Georgia or orginating on and south of the Georgia & Florida, going to the middle west, say Buffalo-Pittsburgh territory, would be a large volume of melons, cantalopes, produce and vegetables of all sorts, lumber and forest products, and possibly citrus fruits. Commodities which we would expect to move from the north and west over the Norfolk & Western or its connections and delivered to us at Winston-Salem, and moving to points on our line and beyond, southward, would be Virginia apples, tomatoes, canned goods, plaster, cement, and New York State and Canadian produce. Of course, coal would be the largest commodity which we would expect to handle on our line.

[fol. 208] What he meant by an interurban line is a line doing the business of the character of the Piedmont and Northern, and further that if the Piedmont and Northern were connected up with the Norfolk and Western and maybe with other lines, that this would not justify a change in the terms as it would still be interurban.

The P. & N. receives an average of 11.2¢ rental per year, per square foot on its warehouse property and in this section the Southern Railway receives 8.9¢ per square foot for such property and the Charleston & Western Carolina, 5.7¢ per square foot; the P. & N. receives 1.4¢ per square foot ground rent for property which it rents and for similar property the Southern receives 1.3¢ and the C. & W. C. 1¢ per square foot. The P. & N. receives 9½ per cent on the capital invested in its warehouse property.

W. W. Watt, for 46 years a wholesale hardware merchant in Charlotte, testified that his observation and experience has shown that the Piedmont and Northern has rendered service more facile and more flexible than that rendered by the steam roads and that in his judgment if the unjointed units as a whole can serve as acceptably as they have served, that the jointed units of the whole will be just that much more serviceable.

H. L. McLaren, of Charlotte, President of the McLaren Rubber Company, and also a member of the State Board of Conservation and Development of North Carolina, testified that in his opinion the proposed construction will provide local transportation facilities which are not now available; that the road as extended will move freight more expeditiously from interstate points.

Chas. O. Hearon, newspaper editor of Spartanburg, South Carolina, testified that in his opinion the ability of the Southern Railway to furnish such facilities as are neces- [fol. 209] sary is not equal to that of the P. & N.; that a steam road will not render the service in this territory that an electric line does.

W. H. Henley, Traffic Manager of the Spartanburg Transportation Association for the past eight years, testified that all freight service rendered on the P. & N. line has been very satisfactory; that the service rendered is somewhat different from that rendered by the Southern Railway which has longer hauls; while the long haul service of the Southern is satisfactory, there is considerable complaint against local conditions, delays and such as that, and to that extent the service of the P. & N. is more satisfactory.

E. B. Hardin, Auditor of the P. & N. filed as Exhibit No. 39 table of classified tonnage of the P. & N. for years 1923-6.

Cross-examination:

Exhibit 39 shows total carloads handled in each of the years; in 1926 it shows 1,456,195 tons converted into cars was 95 per cent of the traffic; only 5 per cent of the traffic is less than car-load. Exhibit 39 for 1926 shows total less than car-load tonnage 75,314 tons, or 5 per cent of the total.

Redirect examination:

The information shown on Exhibit 39 was gotten up with reference to tonnage and not with reference to cars. If it

had been prepared with reference to cars, the perecentage between the carload shipments and the less than carload shipments would show less than carload shipments to be approximately 20 per cent of the total.

CARL E. ANDERSON testified he is associated with Coverdale and Colpitts, consulting engineers of New York, whose work consists in preparing reports as to financial aspects of railroads, etc.

[fol. 210] Has made an examination as to the origin and destination of P. & N. traffic interchanged with its connections. Petitioner's Exhibit 44 is a chart showing loaded car movement inbound, and a chart, Petitioner's Exhibit No. 45, shows the loaded movement outbound.

On these charts the points of origin and destination west of the Mississippi River are not shown. The information ended at the Mississippi River gateways. There are many things obvious from these two charts. The first one is that practically the entire territory east of the Mississippi River is tributary to the P. & N. On the inbound chart cars shown as originating near Deepwater and Bluefield routed through Lynchburg and the cars from Harriman and Knoxville and from Appalachia through St. Paul are very largely a coal movement.

It is quite striking that the outbound movement is very largely confined to the Seaboard and the inbound movement largely to the Seaboard, Clinchfield and Southern.

GEORGE W. BURPEE, a partner of the firm of Coverdale and Colpitts, Engineers of New York City, testified that he had been actively engaged in engineering work since 1906, having been with Westinghouse, Church & Kerr Company, Engineers, up to 1921, and since then with Coverdale and Colpitts, whose business consists largely in the examination for financial interests of railroad business and dealing generally with all features of railway business.

Exhibits 44 and 45 show distribution of freight originating on and destined to the P. & N. and this freight is derived from and moves to every section of the United States

east of the Mississippi, and of course a certain movement west of the Mississippi not shown because the chart does not extend that far; the present road in its disconnected [fol. 211] condition serves an extensive tributary territory and the connecting up of the two links and the extension of the line to Winston-Salem will result in a benefit to all of the communities served by the Piedmont and Northern at the present time. This road will furnish an outlet for independent short lines to the South, to lines to the North which are not at the present time connected with the existing Southern trunk lines. The construction will strengthen the existing Piedmont and Northern system and change it from a pair of short branch lines to what is still a short line, but a continuous short line.

Cross-examination:

I believe this line as proposed to be extended would tie into the Georgia and Florida, and at its Northern end into the Norfolk and Western. The three lines will thus compose a through line from the Southern termini of the G. & F. to the Northern termini of the N. & W. but it would be operated by the three independent corporations, but physically would constitute a through line. I do not believe it would be as strongly competitive as if owned by one corporation; the potentiality of competition would depend upon the kind of working arrangements that might be arrived at between these three roads. The business that the G. & F. and the P. & N. and N. & W. would carry or might carry is not closed to the S. A. L. or the A. C. L. or Southern, they have to compete for it. The P. & N. is of such a character that constituting a link in what has been described as a new physical through line it could carry through freight over its part of the line. The P. & N. is of standard railroad construction and excellent construction for the tonnage that it has to carry. I do not doubt that cars which move via the P. & N. move in unbroken carloads to the [fol. 212] Pacific Coast; I know that they move in carloads to New England; carload movements from the P. & N. to New England or in the reverse direction were left off of Exhibits 44 and 45; bridge traffic was also left off; at present bridge traffic is not a serious matter, about 2 per cent; after the proposed lines are built this bridge traffic

will be substantially increased in my opinion, almost 16,600 cars per year in both directions; that bridge traffic will be taken away from other lines.

Redirect examination:

In my opinion the proposed construction will not impair the general transportation system of the country. The present movement of West Virginia coal through Richmond or Durham is not the natural route to points on the P. & N. in comparison with the proposed lines of the P. & N. Such a route is a very circuitous routing. Irrespective of any community of interest between the Southern Power Company and the P. & N. Railroad Company the natural route for the movement of coal with the line constructed from Charlotte to Winston-Salem would be through the short line.

Recross-examination:

I know there is a line of the Southern from Winston-Salem to Charlotte; that would be a far more natural route than the circuitous route shown on Exhibit 44. If the traffic were left to the naturalness of the flow, I believe it would go that way rather than the way it is shown on the Exhibit under present circumstances.

J. H. Separk, of Gastonia, Secretary and Treasurer of seven cotton milling corporations, and a director of the Piedmont and Northern, testified that he participated in two or three meetings of business men at which Messrs. Duke and Lee were present in the early part of 1911; officials of the Railway Company stated that the road was to be [fol. 213] built from Greenwood to Durham. He had a conversation with Mr. Duke in the latter part of 1920 and Mr. Duke stated it was his intention to complete the Piedmont and Northern line from Greenwood to Durham, saying that the work had only stopped temporarily, but when business conditions justified it would be resumed.

W. H. Wood, of Charlotte, President of the American Trust Company, and also President of the North Carolina

Railroad Company, testified that the Piedmont and Northern Railway Company furnishes a local service, both freight and passenger, which the steam roads necessarily can not give.

W. T. RANKIN, Mayor of Gastonia and owner of two cotton mills, testified that he owns a mill seven miles South of Gastonia; when Mr. Duke and his associates were trying to build this road just before the War, they started getting rights of way around that territory but the War came along and stopped them; in 1916 Mr. Duke came out with Mr. Zeb Taylor and told Colonel Armstrong and the witness to go ahead and build on these sites and they would take care of them when they built the additional lines of railroad.

JOHN L. GILMER, President of the Chamber of Commerce of Winston-Salem, testified that the building of the proposed line will provide the shippers of his city an additional transportation artery which will render a character of local service they do not at the present time enjoy; while Winston-Salem is at present served by three railroads, its shippers do not receive the type of service on local shipments that will be possible with a line such as it is proposed to complete.

Cross-examination:

The statement I have read represents the concensus of opinion of the Directors of the Chamber of Commerce. [fol. 214] Winston-Salem is now served by the N. & W., the Southern and the Winston-Salem Southbound; in my opinion, and I think the opinion of the Chamber of Commerce, we would like to have a fourth line, and, if there was any prospect of getting it, a fifth line; of a sixth line; the more lines we have the better it would be.

J. L. GRAHAM, of Winston-Salem, Vice-President of R. J. Reynolds Tobacco Company, testified, as an operating proposition, and as enabling the P. & N. to offer a more satis-

factory service to the public, the gap between Gastonia and Spartanburg should be completed so the present detached parts of the system can be operated as a continuous line and that the proposed extension from Charlotte to Winston-Salem is logical. I don't think there is any great demand for passenger service by railroads between Winston-Salem and Salisury which in and of itself would justify this construction. Don't think the passenger service is a very important factor to railroads just now, but I do think that with an electrified service between these points it would be much more flexible, for instance the busses do not carry colored folks, but an electrified line like this could very easily do that and give them a sufficiently frequent service to make it attractive.

C. F. Bauserman, of Winston-Salem, Traffic Manager of the P. H. Hanes Knitting Company, testified that his concern ships considerable goods to Greenville and other points South of Winston-Salem and it takes as long as six to eight days to get goods to Greenwood, S. C., four or five days to Gastonia, Spartanburg, Greenville, Concord, four days to Salisbury, and not quite so long to Charlotte; that his Company draws shipments from Greenville and Gastonia which take four or five days; that the service to be rendered by a flexible interurban electric line will handle this business in 24, and certainly not more than 48 hours.

[fol. 215] Cross-examination:

The Hanes Knitting Company is located on the Southern Railway line. The Winston-Salem Southbound is a connecting link between two trunk lines, the N. & W. and the A. C. L.; the P. & N. is an independent carrier; this fact would not prevent it from being a connecting link between two trunk lines, and carrying traffic as such connecting link. It would be reasonably contemplated that it would carry traffic as a connecting line between the Georgia and Florida and the N. & W., the amount, of course, depending on the amount of traffic interchanged between these roads. We have less than carload shipments consolidated by the Southern at the Spencer Transfer, and then forwarded in carloads to distant points; the speed of that service is on the average good.

H. R. Stevenson, of Greenville, operator of a large laundry and dye works at Taylor, 11 miles from Greenville, testified that he received shipments from Greenville, 11 miles away, over the Southern Railway which had required as long as eight days; that the average time for such shipments is around five days; that the P. & N. puts shipments through in one day; that he has investigated the matter and found that his goods were detained at the junction at Spartanburg; shipments from Greenville are carried to Spartanburg and brought back on the southbound trucks; representatives of the Southern Railway said they could not shift over the southbound trucks; most shipments received are in less than carload lots; all northbound incoming freight goes to Hayne Junction at Spartanburg and is brought back to Taylor; carload shipments formerly were taken to Spartanburg but are now taken to Greer and in that case one day is lost. Over the P. & N. goods are delivered from Greenville to Taylor in one day. We were told [fol. 216] that he got goods from Charlotte to be laundried; had them routed via the Seaboard to Greenwood and then by the P. & N. in order to make better time, saving four or five days.

L. W. Fraun, wholesale dry-goods merchant of Greenville, S. C., testified that the Piedmont and Northern Railway has handled his shipments more satisfactorily than the Southern; that as a result of traffic delays he has taken up the matter several times with representatives of the Southern Railway; one of these representatives asked him to use the P. & N. to Spartanburg, saying it would handle shipments quicker.

W. S. Commerce, of Charlotte, N. C., for the past 16 years Traffic Manager of the Charlotte Shippers' and Manufacturers Association, testified for this Association, the City of Charlotte, County of Mecklenburg, Charlotte Merchant's Association and other trade bodies; his organization, the Charlotte Shippers' and Manufacturers' Association, has been interested in the completion of the

original plans of the Piedmont and Northern ever since the construction was first begun, representing the entire life of both the association which he represents and of the Piedmont and Northern Railway.

We interested ourselves in the lease of the C. C. & O. to the Atlantic Coast Line-Louisville & Nashville Systems by intervention on behalf of the Seaboard Air Line, because we wanted to see the Seaboard have a western outlet and a line tapping the coal fields of southwest Virginia, eastern Kentucky, and Tennessee. By that intervention we also hoped, in the disposition of the C. C. & O., to secure a connection between the Georgia & Florida and the P. & N. between Augusta, Georgia, and Greenwood, South Carolina, and also the building of the connecting link of the P. & N. between Spartanburg, S. C., and Gastonia, so as to afford a new and additional through route between the north and [fol. 217] the south connecting at Charlotte the completed P. & N. route with some northern connection, and also a through route over the Seaboard Air Line through Charlotte from east to west.

I am not testifying concerning the local plans of the Piedmont and Northern. I am interested in the completion of an independent through transportation route from the South to the East and West through Piedmont, North Carolina.

The completion of the G. & F. from Augusta to Greenwood, which has been authorized by the Interstate Commerce Commission, and the completion of the Piedmont & Northern as proposed in this case, will afford a new through line from Florida to the Eastern Markets. At St. Clair, Georgia, a connection will be formed with the Savannah and Atlantic into Savannah; and at Charlotte with the Norfolk Southern into Raleigh, Washington, and Elizabeth City, North Carolina, and Norfolk, Virginia, traversing central and eastern North Carolina.

By forming the connection at Winston-Salem, traffic can move through Roanoke, thence to Hagerstown, Maryland, and to the markets of the East; thence also to Cincinnati, and Columbus, Ohio, via Kenova, West Virginia. The completion of the Piedmont and Northern will thus afford a new independent and additional competing through route from the south to the east and west, a route owned, con-

called and operated by interests other than those already serving the southern territory.

I have the figures to show the number of carloads and the tonnage and the relationship which the carload traffic bears to the total tonnage as well as the relationship which the L.C.L. freight bears to the total tonnage for the several regions and districts of the United States and the United States as a whole.

[fol. 208] Mr. Hemes, Auditor of the P. & N., testified that less than carload business of the P. & N. as to tonnage was twenty per cent of the total business. The figures I have show that the L.C.L. business for the United States as a whole is 2.79 per cent; for the Southern region it is 3.84 per cent and for the Southern District as a whole it is 2.08 per cent; for the New England region it is 6.74 per cent and for the entire eastern district it is 2.73 per cent.

From the mileages of the various routes shown on Exhibit 55, it will be readily seen that a large competing transportation system will thus be set up between important points in the west and eastern and southern territory, affording at all times ample competitions between the carriers in serving the southern territory, which must result in tremendous benefit to the shipping public of the southeast, a benefit in which of course they are bound to take great interest.

Close of evidence in chief for petitioner.

Evidence for Intervenor Seaboard Air Line Railway Company

C. H. Crews, First Vice-President of the Seaboard Air Line Railway, who has been connected with that railroad for 35 years testified that he alone represented the Seaboard Air Line in negotiating the contract with the predecessors of the Piedmont and Northern in 1916, which has been referred to by Mr. Lee and Mr. Thomason. In 1907 or 1910 the policies of the Carolina and Northwestern Railway, then controlled by the Southern Railway, toward the

Seaboard made it impracticable for the S. A. L. to get any of the traffic at Gastonia, and the S. A. L. then being in the hands of a Receiver, felt the need of an independent connection at Gastonia; with this idea in mind he met Mr. J. B. Duke in the fall of 1909; about that time relations between the S. A. L. and the Atlantic Coast Line, which controls the Charleston and Western Carolina Railway, were such that the S. A. L. was afraid it could not continue to handle traffic in connection with the C. & W. C. Railway to competitive points, such as Greenville, Spartanburg and Anderson; as a result of the conference Mr. Duke became interested in constructing a railroad from Mt. Holly, N. C. through Spartanburg and Greenville to connect with the S. A. L.; at subsequent conferences the plan was enlarged to further construct a line from Charlotte northward through Concord, Salisburg and Greensboro to a connection with the Seaboard at Durham. At Durham the Dukes own another railroad—the Durham & Southern, extending from Durham to Dunn, N. C. In none of the conferences, etc., was reference made to a line to Winston-Salem.

[fol. 219] The first discussion I had about the project of building to Winston-Salem was about June 1924, when Mr. Thomason came to Norfolk and outlined to me the project of building from Charlotte to Winston-Salem. Mr. Thomason said that Mr. Duke told him to see me and find out how the Seaboard felt about the project and I told Mr. Thomason the S. A. L. did not favor it; subsequently I saw Mr. Duke in New York and Mr. Duke told me that while he was not convinced himself that the project of going to Winston-Salem was a good one, the relations between the railroad and the Seaboard were such that he was not disposed to do a piece of construction the Seaboard would regard as unfriendly. In October 1926 Mr. Thomason told me in Charlotte that the P. & N. had about made up its mind to build right away as far as Lexington with the idea that when that piece of construction was completed it would immediately go on with the completion of the original Greensboro to Durham project; no reference was made in this discussion to a line to Winston-Salem.

Our first information as to the projected line to Winston-Salem was the filing of the application by the Petitioner on March 25, 1927.

The map of the Piedmont & Northern Railway, as shown in the Official Guide, and as late as June, 1927, and referred to on page 8 of the application as having been so carried since 1916, does not show Winston-Salem as located on the projected line from Charlotte to Durham.

In my opinion the Piedmont and Northern is not in any sense an interurban line in the generally accepted sense of the word "interurban"; except for the use of electricity instead of steam, the character of business and service of the P. & N. is not different from that of steam railroads in [fol. 220] the same territory; its tracks serve cotton mills and other industries, just as do the steam roads; local between city traffic of the P. & N. is inconsequential; the great bulk of its traffic is interchanged with steam railroads and handled in competition with them; different from the usual electric, suburban or interurban line, it is a party to the American Railway Express Company Uniform Express Contract. It is a party to the tariffs of steam railroads and follows their methods in matters of divisions, interline billing, claim settlements and all of its relations with shippers; the annual report of the North Carolina Corporation Commission of 1923 and 1924 groups the P. & N. along with steam railroads rather than with electric lines.

The agreement of December 9, 1910, between the Seaboard and the predecessors of the Piedmont and Northern Railway provides: "The companies propose to construct a line or lines of standard guage railway to be operated as a common Carrier of both freight and passengers, to use steam, electricity, gasoline or other motive power." Nowhere in this contract is reference made to the predecessors of the Piedmont and Northern Railway as interurban electric Carriers. Paragraph 5 of the agreement of December 9, 1910, provides "* * * and the parties hereto shall facilitate the interchange between their respective lines of railway of all joint traffic, including passenger, freight, mail and express, by means of through tickets, through billing of freight, interchange of freight cars, and in all such respects will conform to the established usages between railways whose interests are closely allied." So far as has appeared in these proceedings, there is nothing to prevent the Piedmont and Northern Railway from changing its motive power from electricity to steam or

gasoline at will. That there was doubt in the beginning as to whether what are now the P. & N. Railway Lines would [fol. 221] use steam or electricity is indicated in a report which I made Mr. Meldrum, then President of the Seaboard, under date of January 5, 1910, in which report I said: "When I last talked with Mr. Duke he had not fully decided whether he would use steam or electricity."

In answer to the testimony of certain witnesses for the Petitioner that the characteristics of the P. & N. as an interurban line are shown by its ability to make sharper curves than steam railroads; we have on the Seaboard one situation where we have industrial tracks with curves running up to 60 and 70 degrees. That is at Columbus, Georgia, and we serve those tracks with a steam dummy engine. We have at other points on our lines industrial side tracks with curvatures up to 33 degrees which we serve with short coupled switching engines.

We have some tracks in Tampa which have a curvature up to 33 degrees. We have some at Jacksonville and some at Wilmington up to 25 degrees. We probably have tracks with as deep a curvature at a number of other points, but I am not familiar with all of them.

In 1926 the Seaboard received a total gross revenue of $2,409,958.75 on freight interchanged with the P. & N. Railway. This revenue was devided as follows: Greenwood $1,052,401.04; Pinoca, $1,357,557.71, and was also divided as between traffic received from and delivered to the Piedmont and Northern Railway as follows: Delivered $1,828,-810.65; received $581,148.10. 856,484 tons were delivered to and 157,415 tons received from the P. & N. Railway.

After a thorough study of the Seaboard's freight interchange traffic with the P. & N. Railway by its traffic representatives most familiar therewith, my opinion is that of [fol. 222] the interchange revenue of over $2,400,000 in 1926, the Seaboard has at risk in this case $1,349,250, which is nearly 60 per cent of its total interchange revenue. The Seaboard has no information from the P. & N. Railway as to possible and probable changes in its relations, nor as to what additional traffic its projected new lines will obtain, nor any information as to what part if any, of this additional traffic the Seaboard may expect to enjoy. Under these circumstances the Seaboard feels justified in placing

as its risk the traffic which it may not hope to handle without the continued good will and support of the Piedmont and Northern Railway.

If the P. & N. connects with the Norfolk & Western on the north and the Georgia & Florida on the south, forming a through line, such line would unquestionably divert other business from the Seaboard Air Line. That diversion was not included in my estimate of possibility of loss.

Evidence for Intervenor Southern Railway Company

B. HERMAN, testified that he is Chief Engineer of the Southern Railway System, and has been with that line since October, 1900.

I have measured the distance between the existing and proposed lines of the P. & N. and the Southern. From Greenwood to Greenville, at no point are the two roads as far apart as one mile by airline distance.

From Belton to Anderson they are at no point as far apart as one mile by airline distance. From Greenville to Spartanburg they are, at one point, by airline distance, one mile apart. At no other point are they as much as a mile apart.

Between Gastonia and Charlotte the greatest distance apart is 4.7 miles. The average distance apart is much less.

Between Charlotte and Winston-Salem the greatest airline distance apart from stations on the Southern to points [fol. 223] on the proposed line of the Piedmont & Northern, is 6.5 miles, and from Spartanburg to Gastonia the greatest airline distance apart would be 2.5 miles.

I have had investigated the curvatures of certain industrial tracks now in operation on the Southern Railway. I did not get all of them. We have four such tracks with 40 degree curves at Richmond, Virginia; at Salisbury, North Carolina, one with a 24 degree curve.

At Winston-Salem, North Carolina, 3 tracks with 20 degree curve; at Charleston, South Carolina, 29 degree curve; at Cincinnati, Ohio, we have a 70 degree curve. The radius of that curve is about 80 feet; at Chattanooga, Tennessee,

a 46 degree curve; at Louisville, Kentucky, a 36 degree curve; at Selma, Alabama, a 35 degree curve; at Tallapoosa, Alabama, a 30 degree curve; at Memphis, Tennessee, a 27 degree curve; at Germantown, Illinois, 27 degrees; at New Orleans, Louisiana, 25 degree curve.

This is only a partial list. Within the time we have been unable to canvass the system to get all of the curves, even above 20.

These tracks are all in actual service and are switched with ordinary switch engines, except at Cincinnati on the 70 degree curve we can only use one of our short, small-wheeled switch engines. We have no trouble getting around the sharpest of these curves with a small switch engine. On one curve between Asheville and Morristown, on our heavy freight and passenger line, we handle mountain type engines and Santa Fe type freight engines over a 17 degree curve. Exhibits 70 and 73 were put in evidence by this witness and copies of said exhibits are hereto attached and made a part hereof.

A. H. PLANT testified: I am Assistant to the President of Southern Railway Company. I have made a study of the Southern Railway Company's probable loss in revenue if the Piedmont and Northern line is constructed as now pro- [fol. 224] posed. I have based my conclusions on actual revenues derived by the Southern on freight traffic handled by it into the stations to which the Piedmont and Northern proposes to build, and the revenue on freight originated at those stations and forwarded out via the Southern Railway for a period of twelve months, based on two months actual figures, namely, the months of October, 1926, and May, 1927.

I took those two months because they represent, generally speaking, two extremes; one a heavy month and the other a light month.

I threw the inbound and outbound traffic together, and it produced for twelve months 151,248 cars, 4,682,568 tons, and $18,175,204.32 or an average revenue per car earned by the Southern Railway on the traffic into and out of these stations of $120.16.

According to Mr. Thomason's estimate, the traffic over the proposed lines of the Piedmont and Northern for the first year will be 83,320 cars. Of this the bridge traffic would be 12,000 cars, so the loss to the Southern Railway Company would be 70,320 cars. Applying the Southern's average revenue of $120.16 per car, this loss in money would be for the first year, $8,449,651.20. This, however, does not constitute the Southern's total loss; the 12,000 cars of bridge traffic is not taken into consideration; and it is fair to assume the Southern will lose a large proportion of this.

The estimate includes nothing for increased business after the first year of Piedmont and Northern operations.

The loss of traffic from these sources cannot be estimated with accuracy but will obviously amount to a large sum, which must be added to the $8,449,651.20.

The loss to Southern for subsequent years should and [fol. 225] nat*ru*ally would increase. The loss for the first year would be not less than $8,449,651.20; for the second, $8,216,679.53; third, $10,046,635.28; fourth, $10,950,747.95; fifth, $11,930,907.49; sixth, $12,987,113.89; or a total for the six years of $63,581,935.34, which is the approximate loss that the Southern would sustain if it should lose the traffic it now handles. These figures are based on the revenue derived from the traffic actually handled by the Southern into and out of the stations in question and, on information found in the answer of the P. & N. Railway Company to the questionnaire submitted to it by the Interstate Commerce Commission in this case.

The earnings per car to the Southern on traffic both in and out of the territory are $120.16 per car; the P. & N. only gets $43 and odd cents per car revenue; its mean length of haul is 28.8 miles. The average haul on the Southern for the year 1926 was 187.43 miles. So that each $43 and odd cents per car that the P. & N. made would deprive the Southern of $120 and odd cents on that same car.

Cross-examination:

The net earnings per share over fixed charges of stock of the Southern Railway in 1926 was $17.16 per share and in 1925 $16.31 per share. If the Southern had lost in 1926 what I estimate it will lose the first year if the proposed

P. & N. lines are built, the net earnings of the Southern would have been reduced about $3,000,000.00, reducing the earnings per share of stock to about $14.00 plus. I do not know whether the earnings of the Southern were subject to recapture under the Act of 1920 for the year 1926 or not. The Southern has paid dividends on its common stock since 1924; 5 per cent in 1924 and the last dividend was 7 per cent; if the Southern earns $14.00 per share, as a general proposition it could pay a 7 per cent dividend.

[fol. 226] Mr. Thomason said that he would gain about 82,000 cars of new traffic. I gathered from the testimony in this case that the Piedmont and Northern expects to receive about fifty per cent of the business of those stations. The Southern moved into and out of those stations for one year about 152,000 cars. Mr. Thomason said that he would have about 12,000 cars of bridge traffic, which deducted from his 82,000 would leave about 70,000 cars of local traffic, which happens to be just about one half of the total number of cars we originate and carry out and bring into those stations. That is about the extent of the investigation that I have made

---

G. H. Kerr, a witness for the Southern, testified: I am freight traffic manager of the Southern Railway System. I have been engaged in railroad work for about 27 years, the past 20 of them with the Southern Railway System.

The effect of the construction of the present lines of the Piedmont and Northern was to divide the available traffic, the Southern losing at various points from 25 per cent to 75 per cent of the business. I believe the average, certainly at mill points, was about 50 per cent.

This loss of business to the Southern resulted in a considerable impairment of its service. For example on the line from Greenville to Greenwood, the Southern Railway had operated two daily freight trains each way. The diversion of a large share of the business to the Piedmont and Northern reduced our traffic to a point where we have since been operating only one regular train each way daily, which handles both through and local traffic, resulting in some delay to both compared with the former service.

There is absolutely no difference between the manner in which the Piedmont and Northern handles traffic and that in

[fol. 227] which the Southern Railway handles it. The Piedmont and Northern handles and interchanges carload traffic just as the Southern Railway or other steam roads. Their merchandise between local points moves in local trains and to distant points it must be sent to transfer points for consolidation and delivery to connections. Their average haul is so short that it could have no material bearing on through, long haul traffic, I mean on the service.

Cross-examination:

The local freight stations on the P. & N. between Gastonia and Charlotte are about as thick as on the Southern. They might be a little thicker on the P. & N. on some parts of the line; the Southern has more freight stops between Greenville and Greenwood than the P. & N., certainly as many. I don't think in any general way the P. & N. delivers freight quicker than the Southern. Between certain points they probably have locals that cover it, but I know for a positive fact that if their cotton mill business were loaded like ours is, they would have occasion to send more cars to the transfers. You have got to send it to the most advantageous transfer point where you take all the goods out and put them in cars to their proper destination. That is a situation that we cannot help at all. That is the mill that does that.

If a shipper hauls down to one of our local stations a less than carload shipment for another nearby local station, the first local there that comes along picks it up and puts it in the car and when it gets down to the destination, they take it out, and deliver it, and that is exactly the way the Piedmont and Northern would do.

I have not checked the question of whether the Piedmont and Northern runs more frequent local freight trains to [fol. 228] such points along its lines than we do to the points on our line. I do not dispute it at all, but I just have not made that comparison in any general way. I don't doubt that as between certain points they may have more local trains in 24 hours than we do.

The Spencer transfer was not created to handle purely local movement in this territory at all; it handles traffic for long distance points, in the east, as well as in the west, but it was never intended as a facility for the handling of busi-

ness between this immediate territory. It is not so that such local business as Spencer does handle is handled in a very unsatisfactory way. Such use as it is subject to for local freight is merely incidental to its existence and not its main purpose. At Charlotte the industry is so diversified and so scattered that the Piedmont and Northern Railway would not make anything like the dent in our business here that they would at mill points. I did not mean to create the impression that the Piedmont and Northern took 50 per cent of our business at Charlotte. It took substantial business and is still taking a very substantial business away from us. I would estimate our loss as a result of the building into Charlotte of the Piedmont and Northern as approximately 20 per cent of what we handled the year previous. I did not have the exact earnings in 1912 or 1913, for example, at Charlotte, when I made the estimate. I had the benefit, however, of the experience and judgment of our local transportation and traffic people, because we discussed it in a rather full way.

E. R. Oliver, a witness for Southern, testified: I am Vice-President of Southern Railway Company in charge of traffic.

The character of business handled in the territory served and proposed to be served by the Piedmont and Northern road, consists of raw materials, supplies and miscellaneous [fol. 229] traffic inbound and textiles and other manufactured products outbound, the outbound movement consisting largely of less than carload traffic for distribution in distant territory, the purely local less than carload traffic in the territory being under one per cent. This is particularly true of the products of the textile mills, that industry being the largest in the Piedmont Section.

The mills usually are served by private side tracks. The cars are placed and the mills load into them all of their available shipments at the time of loading. These cars in some instances are loaded with mill products in sufficient quantity to warrant direct movement in solid cars to specified destinations; in other instances they contain shipments for many destinations, and it is necessary to take them to transfer points in order that their contents may be assorted

and placed in cars for direct movement to ultimate destinations or break bulk points.

The local traffic is handled by local freight trains, and where it is delivered to us at our stations, it is picked up by the local freight trains and carried to destinations. In instances where it is loaded in these cars, it must be taken to the transfer points; it is a relatively very small per cent that is put into these trap cars.

There is no essential difference in the method of handling traffic of the Southern Railway and of the Piedmont and Northern. There is, of course, this difference: the Southern takes the cars to its transfer points wherever necessary, and distributes their contents in through cars, but the Piedmont and Northern hauls the car to its junction point with connecting lines, and is there through with them, the subsequent responsibility being that of such connecting line.

As to purely local traffic there is no difference between the handling of this traffic by both lines. In our case, where [fol. 230] the traffic is sufficient, for example, Charlotte to Gastonia, Gaffney, etc., solid cars of merchandise are made up at the Charlotte station and are dispatched by through trains directly to destination, and shipments are ready for delivery the day following receipts. As to traffic destined to the smaller way stations, it is handled by the local freight trains and is unloaded from cars to station platform. This is not different from the method employed by the Piedmont and Northern.

The Piedmont and Northern's service is not more flexible than that of the Southern. We haul the traffic to distant gateways and ports, whereas the Piedmont and Northern turns it over to connecting lines at Junction points close to origins, so their service can be no more flexible than that of their connections, which is no more flexible or responsive to the public needs than that of the Southern Railway. Indeed, none of the connecting lines of the Piedmont and Northern have facilities that can be compared with those of the Southern Railway for the accommodation of traffic.

I have made an examination as to the stops of the local freight trains on the Piedmont and Northern railway, and also on the Southern. The information was taken from the respective time tables of the two lines. We assumed that the Piedmont and Northern stops its freight trains at the points at which the time table shows they stop their

passenger trains. This compilation shows that the Southern between the points I have described stops 41 times in a distance of 114.3 miles, the average distance between stops being 2.8 miles. It shows that the Piedmont and Northern stops in the same territory and between the same stations a total of 40 times, their distance being 112.6 miles, the average distance between stops being 2.8 miles. Exactly the same as ours.

[fol. 231] In my opinion the construction of the Piedmont and Northern to Winston-Salem would have the effect of forming an additional through trunk line between the east and the south on the one hand, and the southeast on the other. The Norfolk & Western reaches Cincinnati and Columbus, Ohio, to the north, and at those gateways connects with the important trunk lines to Ohio, Indiana, Illinois, and to the east. On the east side it has its own line to Hagerstown, Maryland, where it connects with the Baltimore & Ohio, Pennsylvania, Philadelphia and Reading, and the Western Maryland. It has its own line to Norfolk, where it connects with the Pennsylvania and the steamer lines to Baltimore, New York, Providence and Boston.

A connection between the Norfolk & Western and the Piedmont and Northern at Winston-Salem, and a connection between the Piedmont and Northern and Georgia & Florida at Greenwood, South Carolina, would form a continuous through route between the southeast and the northern, eastern and western territories described.

The steam auxiliary plant at Spencer, North Carolina, is the plant Mr. Lee called the Bark plant. The movement for eight months period, October, 1926, to May, 1927, inclusive, for the Bark plant aggregated 4,271 cars of coal. The tonnage was an average of 30,826 tons per month, or 265,008 tons per annum.

Reduced to a working day basis, 26 days per month, this is equivalent of 1,170 tons per day, which figures very closely to the capacity of the plant, which I understand is 1,200 tons per day. All of this coal is now moving via the Southern Railway, and our revenue from it is approximately $751,000.00 per annum.

If the P. & N. Line is constructed this traffic will be diverted and our loss in revenue would be not less than $750,000.00 per annum.

[Int. Com.] We estimate, if the P. & N. Railroad is constructed, and diverts this traffic, which I have no doubt it will do, that their revenue on that will be not less than $158,584.80 per annum. That is to this one Duke plant at Spencer.

In addition they have the steam plant at Duncan, N. C. which consumes approximately 187,200 tons per annum, on which we estimate the P. & N.'s revenue is $146,073.60; a plant at Mt. Holly, N. C., which is about the same size as the one at Duncan, and the approximate consumption is, therefore, 187,200 tons per annum. This traffic is at the present time moving via the P. & N. and we estimate their revenue at not less than $073,305.60, but I think it is fair to assume that if their railroad should be extended to Winston-Salem there will be an increase in the haul and their revenue on this movement will not be less than $100,000.00 per annum.

There is a small plant at Greenville, S. C. which consumed approximately 78,000 tons per annum, on which we estimate the P. & N.'s revenue at not less than $60,060.00.

Now, with respect to the proposed new plants, which were referred to by Messrs. Lee and Thompson, it was stated that one plant would be located between Gastonia and Spartanburg, one between Lexington and Winston-Salem, and the other somewhere between Greenville and Greenwood. It is also stated that these plants will consume approximately 2,000 tons per day, or a total of 10,000 tons per day, or a grand total of approximately 3,365,000 tons per annum, on which we estimate the P. & N.'s revenue at not less than $4,317,000.00 per annum.

Now, with respect to the public utility gas plants at Winston-Salem, at Salisbury, Greenville, Anderson and [Int. Com.] Charlotte, we assume that these plants will consume not less than 37,500 tons per annum on which we estimate the P. & N.'s revenue at not less than $37,500.00.

Summarizing this whole picture we figure that the P. & N.'s approximate annual revenue on the coal traffic to these plants would be a total of $1,104,477.00.

The proposed new plants will consume approximately 3,365,000 tons, per annum, on which we calculate the P. & N.'s revenue, if the line is extended at not less than $4,317,000.00, making a grand total revenue on coal alone to

the existing steam power plants and to the public utility facilities, and on the amounts to the proposed new plants, of not less than $5,635,472.00.

The connection of the G. & F. and P. & N. at Greenwood would be tantamount to the formation of an additional through trunk line in the south and whatever traffic should be diverted to the proposed new route would be at the expense of existing routes through Ohio River crossings and Potomac River gateways and through Winston-Salem, both in connection with the Southern Railway and the Winston-Salem Southbound and Atlantic Coast Line. And because this new through trunk line route would be composed of three corporate entities would not lessen its effect upon existing lines, particularly the Southern. Naturally, the P. & N., if extended, will prefer its connection to the north and to the south, yielding it its maximum hauls and revenue and connections at intermediate junction points if they participate in the traffic which will have to be done on the terms dictated by the P. & N.

Cross-examination:

My studies lead me to the conclusion that the building of these proposed lines would take very heavy revenues from the Southern Railway, but also that the building of [fol. 234] these lines would be a very good thing for the P. & N. and for the interests behind the P. & N. Railroad.

The location of the Southern Power plant at Spencer was a very good location; I do not know that Mr. Duke put it there because he expected to use the power in operating this P. & N. Railroad. And I assume that a part of the use of that station there would be to furnish coal to develop power for the Piedmont and Northern Railroad. I understand you propose to use electricity, and no doubt if you did, some of it would come from that plant.

The Eno Steam Plant of the Power Company is not far from Raleigh; the building of the new P. & N. line would not interfere with traffic there; that business is given to the Southern Railway and I do not doubt that it paid us a freight bill of $331,000.00 last year. The Greensboro Steam Plant is a rather small plant. I expect they paid us freight of $100,000.00 last year. This business will not be interfered with by the building of the new line.

I was merely undertaking to estimate the revenue of the P. & N. from this coal traffic, and did not mean to suggest that that would be a total loss to the Southern Railway. No railroad ever claims that it is unfair for it to haul coal for its own use.

L. F. De Ramus, testified for the Southern Railway Company; I am General Superintendent of the Northern District of the Southern Railway Company, with headquarters at Danville. Danville, Norfolk, Richmond, Washington and Winston-Salem operating divisions are included within my territory.

I have been familiar with and in close touch with freight traffic moving into and out of the Piedmont Section of North Carolina for about four years.

In general I am acquainted with the character, the construction and operation of the Piedmont and Northern. It [fol. 235] is a standard railroad, so far as roadbed and track conditions are concerned; physically it is a good railroad; laid with 80 pound rail, ballasted with cinder and what appear to be screenings, but cinders predominate. I see no difference in the service rendered by the Piedmont and Northern over that rendered by the Southern, or any other general carrier of freight in this section. They seem to be doing the business of handling freight in much the same way as all the rest of us are doing it. There is no difference in the construction, except in so far as electricity is applied to the rails.

The Piedmont and Northern carries an overhead trolley, like a street car and I think the rails are bonded to conduct electricity.

The Piedmont and Northern switches backwards and forwards over our industrial tracks, and we do the same thing over theirs. Many of the plants are served by the Southern and the P. & N., the Southern's steam engines using its tracks and P. & N.'s motor engines using our tracks.

Cross-examination:

I say the Piedmont and Northern is a standard railroad because it is engaged in the general transportation of

freight. I went over the Piedmont and Northern Railway in April; that part of it from Spartanburg to Greenville. I did not go over all of it. My consideration related principally to its handling of freight and to everything it did, that I saw. I know something about its handling of passengers.

Examination by the Examiner:

The Piedmont Section, according to my idea, extends from say a short distance south of Lynchburg, Virginia, down to possibly Gainesville Georgia. Generally speaking, I would say it comprises between those limits the territory [fol. 236] about forty or fifty miles wide.

LINCOLN GREEN, testified for Southern Railway: I have been assistant to the President of Southern Railway Company since October, 1924, and from January, 1917, to that date was Vice-President in charge of traffic. Prior to that and from April, 1905, I was freight traffic manager of the Southern Railway System.

At present my duties are largely advistory with respect to the President himself, the traffic organization and the legal department in matters of traffic interest and traffic policy.

The development of the hydroelectric system in the South in its relation to the Southern Railway extends all the way from the Potomac River through Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Tennessee, and in Kentucky. Hydroelectric energy is being employed in a very large way for industrial enterprises.

It is not any different here except in degree from what we have along our lines in Tennessee, Alabama and Georgia, except that no other electric power system has engaged in the transportation business. This situation here is unique in that respect. The possibility of it, however, is so great that if it should be extended and others take it up throughout this region, it would be only a question of time when the whole of the Southern Railway, and many system railways in the South, would be very gravely injured.

Because if, as we have here, these electric lines can be extended, contracts made with our shippers to take away 50 per cent of our business, it is only a question as to how far that can extend, when you will bankrupt the Southern Railway.

If in this section there is a power company that owns [fol. 237] and controls large numbers of steam and hydroelectric plants, gas companies, street railways, such a company would certainly, be able to control in a very large way the movement of its own purchases over the railway which it owned.

In what I will call the common territory the practice of handling traffic by the Southern and the Piedmont and Northern is the same, that is to say, we start our local trains out from terminal to terminal in the morning in each direction, just as the Piedmont and Northern does, and we pick up and deliver local freight at the intermediate points just as they do.

I was freight traffic manager in 1912, 1913, and 1914, when these existing parts of the Piedmont and Northern Railway were built. I had an intimate contact with the situation and with many of the participants in it.

Before entering the territory between Greenwood and Greenville the Piedmont and Northern made contracts with most of the mill presidents, obligating the shipper to give the Piedmont and Northern Railroad 50 per cent of his business. Those contracts were carried out and, in some cases, exceeded. Capt. Ellison A. Smythe, who operated a big mill at Pelzer, gave the Piedmont and Northern 100 per cent of his business.

Mr. Louis Parker, president at that time of the Parker group of mills, gave the Piedmont and Northern 100 per cent of the business of his Monoghan mill at Greenville.

There was another at Williamston that gave the Piedmont and Northern 100 per cent of its business.

Two or three others at Greenville also gave the Piedmont and Northern 100 per cent of their business.

The Judson Mill, which was built since that time, and I believe is controlled by the Duke interests, gives the Piedmont and Northern 100 per cent of the business that [fol. 238] the Piedmont and Northern can handle. In speaking of these percentages of traffic, there may be some business that they cannot help giving to somebody else,

but where the Piedmont and Northern is in position to handle it, they get a minimum of 50 per cent, and in some cases, 100 per cent.

The Piedmont and Northern took away from the Southern at least 50 per cent of the business that originated between Greenwood and Greenville that was competitive between the Piedmont and Northern and the Southern Railway. They did not perhaps get all of the 50 per cent from Greenwood proper, because there were some people outside the sphere of influence of the Piedmont and Northern Road, and of the Power Company, but generally speaking—and I think actually—the tonnage that moved locally on that line was cut in half.

The line of the P. & N. between Greenville and Spartanburg was completed in 1914. It established contact with all of our local mills. It did not secure 50 per cent of the tonnage from each of them, nor do I recall just how far they obtained contracts from mills along that line.

As to the line between Gastonia and Charlotte; the major effect upon the Southern Railway's revenue has been upon the business to and from Charlotte, not contracted for, so far as I know, to any particular quantity, but influenced more or less by warehouses on Piedmont and Northern tracks built by some allied interests. Those warehouses being centrally located influenced a great deal of business. I think Mr. Kerr's estimate of 20 per cent effect on our business to and from Charlotte that could be handled in competition with the Seaboard Air Line—Piedmont and Northern route is under the mark.

With respect to the completion of the line as proposed from Greenwood to Winston-Salem, there would be formed [fol. 239] a new joint route between points in Florida and Georgia and points in North Carolina and South Carolina and in the whole territory of Virginia and north thereof, that can be reached by the Norfolk & Western Railway, embracing a very large part of the United States from Maine to California.

The operation of that through route—I am dealing now only with the bridge traffic—must have this effect, that whatever traffic is gained by this route will be at the expense of some one of the existing lines.

The Georgia and Florida originates a substantial traffic in lumber, watermelons, leaf tobacco which it delivers in

considerable volume to the Southern Railway at Augusta. That traffic, leaf tobacco chiefly, moves into this tobacco manufacturing section, Winston-Salem, Reidsville, Durham and Richmond.

The lumber is distributed all over this northern and eastern territory. Some of it we carry to Winston-Salem and deliver to the Norfolk & Western, some to Potomac Yards, some to the Norfolk-Southern here. The Georgia & Florida will be able in connection with the Piedmont and Northern Railroad to handle all the lumber and other things, that we now get from it, to Charlotte and other points in this territory to Winston-Salem and to points beyond, that we now handle either through Winston-Salem or Potomac yards, or that the Norfolk-Southern may handle through Norfolk, and the revenue that the Southern now obtains from this traffic will be subdivided between the Georgia and Florida, the Piedmont and Northern, and the Norfolk & Western Railroad.

The Piedmont and Northern and its connections will be in position to compete with us through the eastern gateways, and the Ohio River crossings, and to compete with the Seaboard Air Line, the Atlantic Coast Line, the Louis-[fol. 240] ville & Nashville, and the Central of Georgia, for this traffic to and from the east, north and northwest.

Eliminating the bridge traffic, and dealing with the petitioner's own statement, I reach the conclusion that its earnings for the first year, are probably understated; but taking the petitioner's own statement that there will be approximately 70,000 cars added to this traffic in the first year of its operation, and their revenue will average $44.00 approximately per car, and our revenue about $120.00 per car, so that our loss will approximate eight and a half million dollars. There is not a pound of that business that will not be taken directly from the Southern Railway because it cannot now move in any other way.

That is not all. The Piedmont and Northern now originates on its present lines traffic which it delivers in part to the Southern Railway, the Carolina, Clinchfield & Ohio, and to the Seaboard Air Line. When it obtains a route through Winston-Salem it will of course carry that business to the Winston-Salem route. I cannot suggest what that would be, but unquestionably the Seaboard Air Line, the Carolina, Clinchfield & Ohio and the Southern Railway will lose

a revenue which they now earn on traffic originated by or controlled by the Piedmont and Northern Railroad.

With reference to the creation of a new joint through route, by the Georgia & Florida, the Piedmont and Northern extended, and the Norfolk & Western, the fact that they are independent entities and not owned as a whole, will certainly not lessen the ability of that joint line to compete for traffic against the other roads, because there are any number of cases where three or more railroads unite in forming through routes and in the performance of a through route service of precisely the same character that is performed by single lines for long distances. Undoubtedly they would [fol. 241] have a through schedule fitted to the Georgia & Florida schedule at Greenwood and to the Norfolk & Western schedules at Winston-Salem.

That middle link of the Piedmont and Northern would have advantages in the matter of divisions.

"Q. I will ask you whether or not that middle or center line, if we assume that its stock is owned and controlled by the Duke Power Company, and if it, the Duke Power Company, owns these other subsidiaries, the power plants, the hydroelectric plants, the gas plants, and the street railways, and other plants you have heard mentioned in evidence, whether that would give it an advantage over the other railroads, and to what extent?

"A. In my opinion, that is the sinister feature of this situation. These power companies do control a large tonnage of coal and other supplies, and through their subsidiaries control even more, and it does influence and would continue to influence in larger and larger measure the volume of traffic to the Piedmont and Northern Railroad, either at the expense of the other lines, or in depriving them of opportunity for future earnings, and on a much increased traffic.

"Q. Mr. Green, if the Piedmont and Northern by virtue of its present lines plus its proposed line should, as you have expressed the opinion, succeed financially in its operations as a railroad, and succeeds in making dividends and earnings, and declaring these dividends, and they were paid into the Duke Power Company and distributed to the interests in that way, would it not in your opinion, enable the Duke Power Company, the subsidiary companies, the steam plants, the street car lines and gas companies to

obtain their freight thereby at a lesser rate or cost than the common public?

[fol. 242] "A. In my opinion, any contribution from the earnings of the Piedmont and Northern Railroad, or from profit from the operation of the Piedmont and Northern Railroad, obtained in the shape of revenues on tonnage of its owners, yields those owners a direct advantage in the cost of transportation, and to my mind is nothing more nor less than an indirect rebate."

I think Mr. Thomason has underestimated the probable amount of bridge traffic which his line will handle in the event of the formation of this new north and south through route in connection with the Norfolk and Western and Georgia and Florida.

In my opinion, the moment the Piedmont and Northern Railroad made its connection with the C. C. & O., the S. A. L., and the Southern and operated under the through rates, it became a part of the general railroad system of the United States and could not be otherwise.

The Piedmont and Northern Railroad publishes a tariff directory which contains a list of all the tariffs that it publishes, and that directory is on file with the Interstate Commerce Commission. It shows that the Piedmont and Northern is, by powers of attorney, represented by nearly every bureau in this country; is engaged generally with the various carriers in publishing tariffs; has an individual concurrence in tariffs with the L. & N. on coal, with the C. C. & O. and with the Southern, and has the advantage of the rates to and from every point in the United States, in Canada, and is as much a part, in my opinion, of the general railroad system of the United States as is the Norfolk & Western which is partially electrified.

The Piedmont and Northern enjoys rates on all classes of traffic from all points served by the system of railroads throughout the United States, and maintains the most extensive traffic organization that I know of for any railroad of its size. It maintains agents in New York, Atlanta, and [fol. 243] at all of its connecting points in this territory. It has a representative on the general committee in this association for the proposal of changes.

I do not recall the exact figure as to how many proposals it has united in, I think 41 or 42 last year. Those are pro-

posals initiated by the Piedmont and Northern for through rates to New England, Pacific points, Mobile, Cincinnati and elsewhere.

Piedmont and Northern tariff No. 17, in effect on February 1, 1927, shows that it has published 502 distinct railway tariffs.

Cross-examination:

I know of no mill other than the ones referred to by Mr. Lee in his testimony in which the Duke Power Company or any of its allied companies have ever owned stock, nor of any mill in which such companies now own stock. The Myers mill at Gastonia is not served by the P. & N. The Lockmore Mill, Industrial Mill, and the Aragon Mill at Rock Hill, S. C., Republic Mill at Great Falls, S. C., Alice Mill at Easley, S. C., Glen Lowry at Whitmire, S. C., Easley at Monroe, N. C., Oakland at Newberry, S. C., Alpine at Morganton, N. C., Amazon Mill and the Jewell Mill at Thomasville, N. C., Dacotah at Lexington, N. C., Durham Mill, Durham Hosiery and Pearl Mills at Durham, N. C., Ervin Mills at Durham and at Coolemee, N. C., Cramerton at Cramerton, N. C., Mooresville at Mooresville, N. C., Pearl at Durham, N. C., Pickett at High Point, N. C., Pomona and Proximity Mills at Greensboro, N. C., Rhodhiss at Rhodhiss, N. C., are not on the present or proposed lines of the P. & N. Most of these mills are on the Southern and some are on the S. A. L. The Norcott Mill and the Locke Mills are not on the present P. & N. line and can not be served by the proposed line unless it goes to Concord.

I know of no industry served by the present P. & N. lines, [fol. 244] or which will be served by its proposed lines in which the Duke Power Company or any of its allied or affiliated companies owns any stock, except the Ranlo Manufacturing Company. I know of no cotton mill in North or South Carolina in the management of which the Power Company or any of its affiliated companies, or the Estate of J. B. Duke participates.

The Southern Railway was organized on July 1st, 1894, and I do not recall any new mileage that it has built in North Carolina since that time, except the double track; every mile we have in North Carolina has been rebuilt.

With reference to traffic other than bridge traffic which would be lost to Southern Railway Company for the first year, which I approximated at $8,500,000.00, very nearly all of that loss would be net, except the sum we may save on other transportation. We might have our taxes reduced. If the Piedmont and Northern Railroad should take from the Southern Railway 70,000 carloads of freight the first year, that would average about 195 cars for each working day. The immediate effect would be to lighten the tonnage in every train operating in this section on the Southern Railway; but that traffic moves in so many directions it could not take off many freight trains; we could not reduce our train service. But, instead of it being 25 per cent profit in that business, it is all profit except as you say we might save in the reduction of the cost of conducting operations, but that would depend altogether on how we could adjust ourselves to the situation. Certainly we could not save 25 per cent of that money by a reduction in expenses.

The record shows that for 1926 the gross revenue derived from the operation of the Southern Railway amounted to $155,467,976, an increase of 4.12 per cent over the 1925 figure, and 1.73 per cent above the previous record reached in 1920.

[fol. 245] Redirect examination:

In my opinion a large stock interest in any company would influence and probably control traffic. To illustrate, Mr. Duke's Estate owns a very large stock interest in the Reynolds Tobacco Company, which is one of the largest shippers of traffic in this section. With the building of the Piedmont and Northern Railway to Winston-Salem it would have access to the business of the Reynolds Tobacco Company, and, in my opinion, would unquestionably take some of that business that is now handled by the Southern Railway.

If the Duke Power Company owned warehouses in the City of Charlotte and leased them to various tenants and at the rentals as testified to by Mr. Cureton, and if the leases between the tenants and the Power Company provided, "The lessee agrees to ship or cause to be shipped

over the lines of the Piedmont and Northern Railway Company all freight going to or from said premises provided the Piedmont and Northern Railway Company affords the lessee facilities and rates for the carriage of said freight equal to those of the competing carriers", I would say that that fact not only would have but does now have a controlling influence on the traffic. The Southern Railway has not itnself, or through any allied company, built warehouses for lease. It has leased vacant property not in use on a basis of six per cent rate as a minimum on the actual value of the property.

If the Southern Power Company owns the controlling stock in the Mercantile Development Company, and that Company leases warehouse space to the various tenants and at the various rentals testified to by Mr. Lee and Mr. Cureton, being a total of 175,000 square feet, at a total annual rental of $47,000.00, that fact not only would but does and has influenced traffic toward the Piedmont and Northern. Those leases, the ones that were created at the [fol. 246] time, have controlled preferentially for the P. & N. traffic which the tenants shipped into this territory from the very early stages of the operation of that road.

The Bridgewater Plant of the Power Company is on the Southern Railroad; the Rhodhiss on the C. & N. W., which is a Southern Company; and the Lookout Shoals plant on the Southern Railway. The Catawba Plant is served by the Southern and also the Oxford Plant. The Fishing Creek, Great Falls and Dearborn plants are served by the S. A. L; also the Wateree Plant. The Ninety-Nine Islands Plant is on the Southern. The Greensboro Steam Plant is served by the Southern and also the Eno Steam Plant. I do not know whether the Southern Railway charges less for its warehouses than the Piedmont and Northern or not.

The Southern Railway Company put in evidence the original contract, made on the 24th day of August, 1925, between Aldridge Grocery Company and J. B. Duke and associates, wherein, among other things, it is provided:

OFFERS IN EVIDENCE

"1. Wherever said railway or any part thereof, shall be constructed and put into operation so as to afford the ship-

per an outlet by rail or by rail and water for its product, without respect to the termini or route of said railway, and the company engaged in the operation of said railway shall give to the shipper rates as low as said shipper can otherwise legally secure, said shipper shall and will give to the corporation engaged in the operation of said line of railway or any part thereof, at least 50 per cent of all traffic and freight incident to the transactions of business by, and the operation of the works of said shipper, whether consigned to or by said shipper in so far as said shipper has a right to route such traffic and freight, and in so far as it is possible for same to be shipped over the line of the [fol. 247] said railway or any extension thereof, whenever acquired, whether by lease, trackage, rights, construction or purchase, or any connection therewith, for the whole or any part of the distance from the point of shipment to the point of final destination with such reasonable service and in such reasonable time as may be required by law."

Attached to the contract was a list of ninety-three shippers of Salisbury, North Carolina, who signed similar contracts.

There was introduced agreements signed by Wood Drug Co., and more than two hundred other shippers of Gaffney, South Carolina, obligating themselves to patronize the Piedmont and Northern Railway Company by guaranteeing to it fifty per cent of all freight controlled by them, "provided the said Piedmont & Northern Railway Company can handle the same expeditiously."

Similar contracts signed by shippers at Blacksburg, and Cowpens, South Carolina, Grover, Bessemer City, and Kings Mountain, North Carolina, were introduced.

Evidence for Intervenor Louisville & Nashville Railroad Co.

JOSEPH G. KERR, testifying for the Louisville & Nashville Railroad Company, one of the intervenors, said: I am with Louisville & Nashville Railroad Company, and am assistant to the Vice-President in charge of traffic. The Vice-President referred to is in general charge of all traffic affairs of

the Louisville & Nashville Railroad Company and I assist him in the discharge of such of his duties as he may assign to me from time to time, but principally in the presentation of evidence to the Interstate Commerce Commission.

By reason of my various duties with the Louisville & Nashville Railroad it has been necessary for me to give considerable study to transportation conditions in a broad way throughout the country, and particularly in the section located on and south of the Ohio and Potomac Rivers and east of the Mississippi River.

[fol. 248] Inasmuch as there will be no material difference in the distance via the new route of the Piedmont and Northern to Winston-Salem and the existing lines of the Southern from Winston-Salem to the Piedmont section, it seems very clear that the Piedmont section cannot expect any reduction in the existing rates. It is clear, however, that the Piedmont and Northern expects the Duke Power Company and its affiliated interests to hereafter move coal from Norfolk & Western mines which, in the past, has been moving from various mines on other lines including, however, the Norfolk & Western Railway.

Exhibit 119 is a statement showing the distances from Chicago, Cincinnati and Detroit, to Charlotte, North Carolina, Spartanburg and Greenwood, South Carolina, and Augusta, Georgia. I have used Cincinnati, Chicago and Detroit as representative of the northern territory and Charlotte, Spartanburg, Greenwood and Augusta, as representative of the territory to be directly served by the Piedmont and Northern in connection with their proposed route through Winston-Salem.

The exhibit indicates very clearly, I think, that in practicall every instance, the distances via the proposed route of the Piedmont and Northern from and to the points shown on the exhibit will be substantially in excess of the distances via the existing short route, and via the proposed merchandise routes of the Louisville & Nashville Railroad, which are authorized by Finance Docket No. 5322.

Exhibit No. 120 uses the same representative points of origin, but the destinations shown are those in the southeastern territory, namely, Augusta, Savannah, Vidalia and Valdosta, Georgia, and Jacksonville, Florida, which I think are representative of the territory which the proposed

Piedmont and Northern Georgia & Florida route would reach.

[fol. 249] Here again it will be noted that the distances via the proposed new route through Winston-Salem are generally substantially greater than those via the existing short routes or the present short routes of the Louisville & Nashville Railroad.

In my judgment the extension of the Piedmont and Northern to Winston-Salem and there connecting with the Norfolk & Western, will result in the diversion to that route, because of various influences, of considerable traffic, both coal and merchandise, which is now being handled by the Clinchfield Railroad.

During 1926 the C. C. & O. Railway delivered to the P. & N. 3,732 cars of coal, 1,581 cars of which was consigned to the Power Company; 4,582 cars of other freight, and 3,422,801 pounds of less than carload freight. In the same year the C. C. & O. Railway received from the P. & N. 745 cars and 1,270,541 pounds of less than carload freight.

In my judgment, the bulk of this traffic, except possibly some of the coal destined to points on the present South Carolina division of the Piedmont and Northern is jeopardized by the construction of the proposed line of the Piedmont and Northern to Winston-Salem.

There is no question in my mind but that coal traffic under the immediate control of the Duke Power or affiliated interests will be largely diverted to the new Winston-Salem route.

I know that for a good many years the Piedmont and Northern in some way has controlled a very large proportion of the traffic originating and destined to points on its lines. And there is no doubt in my mind that if the new lines are constructed and a new joint through route connection via Winston-Salem, through the same influences, a great majority of the traffic will not be open to ordinary solicitation by existing transportation routes.

[fol. 250] Cross-examination:

There is no transportation necessity for the extension and construction of the proposed P. & N. lines; I give no consideration to the interurban benefit the road would be to people along the new lines, because in my opinion it is

not an interurban railroad as the term is commonly understood in the transportation world. According to my conception of the term "interurban railroad" it is not now performing an interurban service; the interurban service spoken of in this case is a mere incident in the operation of a standard railroad.

Any railroad whose traffic is 92 per cent freight and 8 per cent passenger and incidental and 95 per cent of whose freight consists of carload freight traffic, the bulk of which is interchanged with steam carriers is not, in my judgment, an interurban railroad as that term is commonly understood. If I correctly understand operations of the P. & N. I can see no essential difference between its operation and that of any steam railroad. The operations may differ in some way, but in a general way they are the same as any steam railroad in the United States. I am not familiar with the details of the operation of the P. & N.; I know it practically parallels the line of the Southern, which has a double track line in that particular section; in my judgment the P. & N. is performing no service that the ordinary steam railroad could not and would not render.

The Clinchfield does not furnish an interurban type of service, because it is a comparatively new railroad operating through a territory which itself is developing and will have to develop in years to come. It is an entirely different proposition, as I see it, from the Piedmont and Northern, which went into a territory already served by the Southern Railway and which had largely been developed. I cannot testify as to whether the Southern Railway was rendering interurban service before the Piedmont and Northern Rail-
[fol. 251] road was built. The Southern Railway has always had the reputation throughout the country of rendering first class service. I am not familiar with the detail of the so-called local service which the Southern Railway was performing at the time the Piedmont and Northern was built.

Most of the coal now consumed in the Carolinas comes from Virginia and West Virginia served by the C. & O., the N. & W., and the Virginian Railway. It is estimated that 75 to 80 per cent of this coal comes from these territories; if the L. & N. in the future moves 42,000 cars instead of the 6,000 it now moves from Kentucky, the bulk of it will have to be diverted from the Virginia and West Virginia fields.

The Louisville & Nashville is opening up a very large

and fine coal producing field to the Carolinas on the basis of reduced rates through the construction of connecting links and its operation of the Clinchfield. The building of the Piedmont and Northern to Winston-Salem, there connecting with the Norfolk & Western, will not reduce the distance from any coal field to the stations which you propose to serve by more than 11 miles.

In 1925 the net income from railway operations of the L. & N. was $18,700,000, equivalent to $15.98 per share of common stock. The net income after payment of fixed charges for 1926 was $19,422,000, equivalent to $16.60 per share.

I think that probably the great majority of the coal that we have heretofore hauled to the P. & N., South Carolina division, will continue to be handled in that way since the freight is twenty cents a ton lower than it would be by the Northern route; think this freight will continue to be handled that way unless the mines on the N. & W. Railway would absorb the difference in the freight. My own judgment is that probably a good deal of this coal will still be brought up in the Clinchfield Section.

[fol. 252] Evidence for Intervenor C. & W. C. Ry. Co.

A. W. Anderson, a witness for Charleston & Western Carolina Railway Company, testified: I have been connected with the Charleston & Western Carolina Railway Company some 42 years; I have been its general agent, general manager and now its Vice-President and General Manager and in direct charge of its operation. I am familiar with the railroad conditions in the Piedmont Section of South Carolina.

When the Piedmont and Northern was built it seemed particularly to endeavor to secure the patronage of the cotton mills and other extensive users of electric power located in the territory.

Soon after reaching Anderson the Piedmont and Northern asked us to consent to the connecting up with our tracks serving two cotton mills; the mill people told us they wanted the connection and their attitude was such as to make it plain to me that it was necessary for us to make the best

of a disagreeable situation and consent. This promptly resulted in the loss to us of a very considerable proportion of the business, probably one-half.

At Greenville, under an arrangement with the Southern Railway we have joint tracks serving the Monoghan Mills and the bleachery. The Piedmont and Northern promptly demanded the right of access to the tracks of the Monoghan Mills; and we finally had to consent to the arrangement. We at one time did a considerable proportion of the Monoghan Mills and the bleachery business, but now my best information is that we get but a small proportion of it.

Our business has been injuriously affected by reason of the relationship between the Piedmont and Northern and the Southern Power Company. To illustrate; in 1910 the Southern Power Company located a power plant adjacent to our so-called "Monoghan Mills Line," which used a large amount of coal, some 300 or 400 cars annually.
[fol. 253] Our agreement with the Southern Power Company provided that they were to construct their coal chute and we were to construct a track and maintain and operate it, we to get the business.

Soon after the Piedmont and Northern came, without consulting us, it connected a track with our Southern Power Company track and rather promptly absorbed all of the coal business. They declined to buy our track; the Power Company bought it from us at cost; and since that time we have had no connection with the Southern Power Company's tracks nor so far as I know handled any business for them.

I can see no reason why a steam railroad could not and does not serve its industries as efficiently as does the Piedmont and Northern and with less danger of interrupted service.

In a general way I am familiar with what is proposed by the Piedmont and Northern road in the matter of extending their line from Spartanburg to Gastonia and from Charlotte to Winston-Salem. The prosecution of those plans of the Piedmont and Northern if allowed would have a seriously injurious effect upon the business of the C. & W. C.

ERNEST WILLIAMS, a witness for Charleston & Western Carolina Railway Company, one of the intervenors testified: I am general freight and passenger agent of C. & W. C. Railway, and the effect of the building of the present lines of the Piedmont and Northern Railway was to divert to those lines a good portion of the business the C. & W. C. Railway was handling, and this is true particularly from textile mills, the diversion being not on account of service, but on account of what in this hearing has frequently been referred to as the Duke influence. I make this statement [fol. 254] based upon my actual personal experience, in soliciting business from patrons who were formerly giving us all, or a very large part of their business. The construction of the Piedmont and Northern Railway in the territory we serve resulted simply in taking away from and dividing with other lines the business that they were handling. This is particularly true at the junction points, Greenwood, Greenville, Anderson and Spartanburg.

The Union Bleachery at Greenville is only reached by the Southern Railway and the C. & W. C., and prior to the building of the Piedmont and Northern Railway we handled about 50 per cent of their business, while now the P. & N. handles at least 50 per cent of their business due to the Duke influence.

The Victor Monoghan Mills, at Greenville, was reached by the Southern Railway and C. & W. C. and their business was about equally divided between these two lines, but since the Piedmont and Northern Railway built to Greenville it is handling a large share of this business, the C. & W. C. handling very little.

The Piedmont and Northern has decreased its passenger trains in the past few years, more than one third.

In my opinion, if the proposed construction by the Piedmont and Northern is permitted, and if the Piedmont and Northern forms a part of through routes, such as it has indicated its intention of doing, the result will undoubtedly be injurious to the C. & W. C. The line between Spartanburg and Gastonia will make physically possible a new through route from C. & W. C. points served also by the Piedmont and Northern through Charlotte in connection with the Norfolk-Southern to Norfolk, and thence to the

North and East. The C. & W. C. is now a party to through routes and to the extent that business is diverted from its lines, it will be deprived of the opportunity to perform a service for which it is fitted and which it is now satis- [fol. 255] factorily performing.

Cross-examination:

As to warehouse leases by railroads, it used to be that they contained a provision reading that service being equal the industry would ship over the road. Whether it is in our present contract or not I can't tell. So far as I know that was the custom of all railroads operating in this section. Whether it has been changed or not I can not say.

I can not say that to my own knowledge the Duke interests control the management or participate in the management of any of the mills I have named.

My representatives in the field and I in some cases called on the mills and we were told that on account of their affiliation with the Duke interests they could not give us any business. I am not particularly talking about the Saxon and Greenwood Mills, I was speaking generally.

In soliciting Mr. Self, he said something about being connected with the Duke interests or in some way having some connection with them and he did not give us any business at that time. And I also recall several years ago calling on Mr. Law, President of the Saxon Mills, and being told practically the same thing. They did not tell me that they preferred the P. & N. service. As I recall it, they said they were affiliated in some way with the Duke interests and they would give the business to the P. & N. on that account. They did not tell me that Mr. Duke owned any interests in either of the mills. They did not tell me that either of the mills owned any interest in the Piedmont and Northern.

Evidence for Intervenor Atlantic Coast Line Railroad Co.

C. McD. Davis, a witness for Atlantic Coast Line Railroad Company, one of the intervenors testified: I am freight traffic manager of Atlantic Coast Line Railroad [fol. 256] Company. I have been in the service of the

Coast Line more than 34 years, most of which time has been in the traffic department.

The Atlantic Coast Line Railroad Company is opposed to the granting of the application on the grounds that such proposed construction is unnecessary and not in the public interest; on the contrary, the contemplated construction, if employed as part of a new joint route for bridge traffic, would unnecessarily and unjustifiedly injure the Atlantic Coast Line Railroad as well as its joint through routes.

Many statements appear in this record about the creation of another competitive joint through route, a fourth railroad system in the South, not under one ownership, but the potential equivalent of another system and it is that possibility that the Atlantic Coast Line most fears.

The establishment of such a joint through route could injure the Coast Line to a serious extent.

The Coast Line connects and interchanges traffic with the Georgia & Florida at Willacoochee, Georgia, and Augusta, Ga. The Georgia & Florida, as to such traffic, is under agreement to make the Atlantic Coast Line its preferred connection in return for our having opened to it in 1927 the joint through route via Willacoochee, Augusta, Charleston and Western Carolina or Georgia road to traffic moving between Florida and the southeast and the west.

If the extension between Charlotte and Winston-Salem is made and if a joint through route were opened, the traffic could be delivered to the Norfolk & Western at Winston-Salem. In either event the Coast Line would relinquish this traffic at Willacoochee and neither the Coast Line nor any of its affiliated lines would further participate in the handling of the traffic.

[fol. 257] The Coast Line would oppose the opening of a joint through route via Willacoochee, Georgia & Florida-Greenwood, Piedmont and Northern-Charlotte, Norfolk & Southern-Norfolk, and connecting carriers beyond, for the reason that if any such through routes were established it would mean for the Coast Line as to Florida, Georgia and Alabama traffic, a haul via Willacoochee only instead of via Virginia gateways, Wadesboro, North Carolina, or other established points of interchange, and it would eliminate the Winston-Salem Southbound Railway on such traffic

to the extent that that line now participates in the movement via Wadesboro.

I have in mind a physical situation on the Atlantic Coast Line that is taken care of by operations similar to those which it has been intimated in this case are peculiar to the Piedmont and Northern Railway. We operate a freight belt line around the City of Wilmington in this State, known as the Dummy Line. The majority of industries at Wilmington, including the wholesalers and jobbers, are directly served by the Dummy Line, and the work is done by steam locomotives, built to negotiate sharp curves and unusual grades, operating an extensive system of tracks laid in the streets of the City. As a matter of fact the Dummy Line was built by and is still owned by a street railway line and is leased to the Atlantic Coast Line Railroad by the Tidewater Power Company, an electric city and suburban line operating over the streets of Wilmington and to and from Wrightsville Beach, about 11 miles from Wilmington.

I have made a recent study of the Winston-Salem Southbound representative carload traffic for the purpose of forming an opinion as to the effect the Piedmont and Northern's proposed construction might have upon the revenues of the Southbound.

[fol. 258] The Southbound is largely a bridge route; this is strongly indicated by the fact that the average haul on the Southbound is only slightly less than its maximum haul. The study I recently made has convinced me that the opening of new routes via Georgia and Florida-Greenwood, Piedmont and Northern-Winston-Salem, Norfolk & Western, or via Charlotte and Norfolk-Southern, might involve a loss to the Southbound of approximately 48 per cent of its present revenue.

Cross-examination:

The building of the Winston-Salem Southbound was a joint venture of the Norfolk & Western and Atlantic Coast Line for the purpose of interchanging traffic between those two lines. The lines of the Norfolk & Western run east and west, terminating at Hampton Roads. Our connection with the Norfolk & Western was formerly at Petersburg. This line was constructed by the two lines for the purpose of interchanging traffic between the two companies and for the

development of the local territory it serves. It has paid us no profits. It forms a through route between these two companies.

It serves another purpose in opening the coal mines on the Norfolk & Western to Carolina territory and the Atlantic Coast Line purchases some of its fuel at Norfolk & Western mines, but our fuel supply is purchased at practically all the mines and comes through the gateways at Richmond and Wadesboro and Montgomery and all the way down the line, and a portion of the coal for our third division or Florida line, comes by water to Port Tampa.

Rebuttal Evidence for the Petitioner

J. E. Cureton, recalled as witness for the Petitioner testified: We intend to interchange traffic with the Clinchfield Railroad at Spartanburg after the proposed lines of the Piedmont and Northern are constructed. I have every [fol. 259] reason to expect that that interchange will increase in volume.

We expect to continue to interchange business with the Seaboard Air Line at Pinoca and Greenwood after this new mileage of the Piedmont & Northern is put in operation.

After this new mileage is put in operation we expect to interchange business with the Southern Railroad to a greater extent than at the present time by reason of the increased mileage.

Cross-examination:

He said in reference to copy of contract between Piedmont and Northern and Merchants' Wholesale Company that this was the contract used by the P. & N. and all other railroads in this territory prior to government control; that since government control the clause in which the lessee agreed to ship over lines of the lessor etc. as a rule is eliminated; that the P. & N. had eliminated this clause and none of its tenants now have contracts containing it unless an old blank was used. The Southern Railway has contracts at this time containing this clause, several of them in Charlotte. Contract of the P. & N., dated April 1926, produced by Counsel for the Southern Railway, contains this clause; this is an obsolete blank, but the contract pro-

duced is in effect today; the clause however is ignored in our business relations with the lessee.

W. J. Edwards testified that he had a lease contract with the Southern Railway dated October 15, 1921, amended September 23, 1925, and again amended June 6, 1927. This lease covers a piece of land in the City of Charlotte, and provides: "The lessee agrees moreover that he will at all times during the life of this agreement maintain and operate his business upon said premises as a going concern producing traffic for transportation over the lines of the Railway Company and its connections, "otherwise there is no clause in it giving Southern Railway Company the preference over other roads."

[fol. 260] Offer in Evidence

The Piedmont and Northern Railway Company introduced in evidence report made by C. P. Howard, Engineer Examiner, to the Interstate Commerce Commission, under date of February 25, 1927, and which omitting immaterial portions, reads as follows:

"Subject: Piedmont & Northern Railway Co.—Investigation of statue under section 1, paragraph (18), and section 20a of the Interstate Commerce Act, with special reference to proposed construction and issue of securities.

Incorporation:

The Piedmont and Northern Railway was incorporated in South Carolina in 1911 under a special act (No. 204 of the General Assembly) entitled an Act "Incorporating Piedmont and Northern Railway Company." This act, approved by the Governor Feb. 24, 1911, grants general railway powers, as also for street railway and power development, the road to be operated by electricity or other motive power.

January 28, 1914, the Secretary of State of South Carolina, acting under authority vested in him by the Code of

1912, etc., granted a supplement or amendment to the charter increasing the capital stock from $5,000,000 to $15,000,000.

Senate Bill No. 50, read the first time in the Senate (S. C.) January 14, 1927, has recently been passed and comprises a further amendment. By this the capital stock is increased to 200,000 shares, total of common and preferred stock of no par value. Exhibit No. 8 is a copy of the concluding paragraph of this amendment and covers the matter of increased capitalization. It maybe assumed that this authority was requested by the Company and reflects its intentions as to increased capitalization.

I was informed by Mr. Lagerholm, Assistant to the Vice-President and General Manager, that the company has no charter in North Carolina. In the original charter or in one of the amendments the company is authorized to exercise its powers in states other than South Carolina to the extent permitted by the laws of such states.

Road and Track:

The line parallels the Southern Railway its entire distance in South Carolina from Greenwood to Spartanburg. From Spartanburg, S. C., to Gastonia, N. C., there is a gap of about 53 miles which has not yet been built. The North Carolina line extends at present from Gastonia to Charlotte, a distance of about 23½ miles. On this stretch it first parallels the Southern and then the Seaboard Air Line.

The road is substantially built on fairly good grades and alignment. The maximum grade between terminals is one per cent. The maximum rate of curvature is usually 6 degrees per 100 feet, but there are a few sharper curves at some of the towns and cities. About three-fourths of the [fol. 261] main line is straight and one-fourth on curves. The average curvature per mile for the entire main line is about 50 degrees. This would be somewhat excessive for a trunkline railroad outside of the mountains, but is reasonable for the business of this road, which is principally freight and moderate speed passenger traffic.

Grading is rather heavy. There are many deep cuts and fills. The line crosses the drainage of the country at right angles and there are a number of bridges and viaducts over

rivers and smaller streams. These are of permanent steel and masonry construction.

The stations are generally brick buildings, but there are a number of small frame shelters scattered along the line for the suburban passengers. I judge these to be located generally from 1 to 2 miles apart.

The line uses the Seaboard Air Line station facilities at Greenwood, S. C., which is its southern terminal.

Ballast is principally a good grade of cinders (from the power plants) with some crushed stone and occasional screenings. Locomotives and passenger cars receive their power from an overhead wire of the usual catenary construction supported by brackets attached to a single line of poles close to the track. Occasionally on curves there are two lines of poles. Tie plates are used on curves. The track is in fairly good line and surface. Rails are of 80-lb. section.

The main line between terminals is located on private right-of-way for practically its entire length. Out of a total of 131.59 miles of main track only 2.9 miles are located in streets, but 11.5 miles or 8.74% are jointly operated with street cars. **(Exhibit 5.)**

Country and Resources:

Most of the country as seen from the line appears to be cultivated and of moderate fertility. But the industrial development is the important feature. Numerous cotton-mills are scattered all along the line and its vicinity. Charlotte, Spartanburg, Gastonia and Greenville are the principal centers. It is claimed that there about 50 miles in and around Gastonia, about 15 at Greenville, 10 or 12 at Belmont, 5 at Greenwood, 5 at Lowell, 4 each at Ranlo, Groves, Greer and Pelzer. One at Woodside, N. C., is said to be the largest complete single mill under one roof in the world. The steam power plant at Duncan, N. C., consumes about 20 cars of coal a day.

Equipment and Trains:

All freight trains are handled by electric locomotives which take their power by trolley from the overhead wire. The engines weigh from 55 to 95 tons, with tonnage rating (1 per cent grades) of from 800 to 1,200 tons.

The train sheet of February 12 shows that one local freight train from Charlotte to Gastonia and return had two engines. As Mr. Lagerholm says, they run "that way once in a while" or "when necessary." This gives the combined tonnage capacity of the two engines but requires but one [fol. 262] engine and train crew. With two of the lightest engines, such as these shown on the train sheet, the combined rating would be 1,600 tons or, say, about 40 cars, depending on the loading and number of empties. With two of the heaviest engines the combined rating would be 2,400 tons, probably from 50 to 60 cars. The number of cars which it would be practicable to handle might, however, be limited by the length of side tracks.

On my trip in South Carolina I passed one of the big engines (#5601) which had 32 cars, apparently 5 or 6 empties, the balance loaded cars. It was a little difficult to count the cars on some of the trains, due to their being broken up at stations, but I was told by one of the trainmen that train No. 48 had about 45 cars and that train No. 47 two nights before had 47 cars. This train had two engines. I judge that trains of about 45 cars are not unusual. I was informed that two of these engines (5501 and 5601) were built at the company's own shops.

The current used is 1,500 volts, D. C.

Freight cars are generally built for interchange (Thomason).

Passenger Trains:

The train I rode on from Charlotte to Gastonia, N. C. had two cars, one passenger and the other a baggage, mail and express car. There was only one motorman but each car had its own power (motor and trolley connection). The one I rode from Spartanburg to Greenwood, S. C., had one motor passenger car and a small trailer express car. We met a train going the other way composed of two motor cars.

As stated by Mr. Thomason, the passenger cars are similar to those of the Manhattan line or to any interurban cars and stop all along the road to pick up passengers. My observation confirms this. The general make-up of passenger trains appears to be from 1 to 3 cars, the last being sometimes a small trailer express car.

Revenues:

Exhibit No. 7 is a statement of freight and passenger revenues from 1913 to 1926, inclusive. For the entire period freight constituted 72.3% and passenger 27.7% of the total. In only one year, 1918, did the passenger revenue exceed freight. In that year it was 54.6% but has dropped rapidly until in 1926 it was only 7.3%. For the past five years passenger revenue has averaged 15% of the total, and this, as shown in the table, includes express. Mr. Thomason attributes the decline in passenger earnings to the automobile. But this does not alter the fact that the great preponderance of the business is freight and apparently is likely to continue so.

Exhibit No. 2, for the year 1926, shows that 93.12% of freight revenue was derived from freight interchanged with connecting lines, 4.75% purely local, and 2.12% "bridge" or overhead traffic. There is a small amount of revenue from express business. This was principally derived from interchange traffic.

Interchange Traffic:

Above statements show the Piedmont & Northern's freight revenue is nearly all derived from interchange [fol. 263] traffic. This checks my own observation. I saw many cars from roads all over the country on Piedmont & Northern's tracks and interchange tracks, but few of its own cars. I judge its own cars are similarly scattered on foreign lines. Exhibit No. 6 is a list of points of interchange with other railroads.

Passenger Business:

Passenger business for 1926 was 97.6% purely local from station to station and 2.4% interchange with connecting lines. (Exhibit No. 2.) It is evidently of an interurban character but, as above noted, produces but a small proportion of total revenues.

Proportionate Mileage of Yard Tracks and Sidings as Compared with Main Line

The Piedmont & Northern has about one mile of yard tracks and sidings to each four miles of main track, a proportion not unusual for a steam railroad. (Exhibit No. 4.)

Tariff and Traffic Association:

The carrier pretty generally joins in interline tariffs. It is a member of the American Railroad Association and is governed by their arrangements as to per diem, etc. It is also a member of the Southern Freight Rate Association. (Thomason.)

Ownership:

The Duke interests probably own control; but no one member of the family. The Duke Endowment Fund with the Duke family probably own controlling interest. Mr. Duke is largely responsible for the power and mill development in this territory and assisted in the financing of the mills. The latter, however, are now indepently owned. (Information from Mr. Thomason.)

Proposed New Construction:

The Company proposes to build from Gastonia, N. C. to Spartanburg, S. C. This will bridge the gap in the line now existing between these points and give them a continuous line from Greenwood, S. C., to Charlotte, N. C. They also propose to extend their line in a northerly direction from Charlotte to Lexington or Winston-Salem, N. C., but the exact route between these points has not been determined. It has not been definitely decided whether the new line will be built by the company itself or by a subsidiary, but it will probably be built by the Piedmont & Northern. (Thomason.)

No contracts have been let nor dirt moved, but the surveys are progressing and they expect to start construction soon. (Thomason.) A connection with the Norfolk & Western at Winston-Salem will give an outlet to the north and west. Perhaps the same might be accomplished by a connection with the Winston-Salem Southbound at Lexington, N. C., this line being jointly owned (Poor's Manual) by the Atlantic Coast Line and the Norfolk & Western, which may explain why Lexington is considered as an alternative terminus.

Conclusions:

The passenger traffic of the Piedmont & Northern is interurban in character but produces little revenue. By far

the greater portion of its business, measured by revenue, is freight, practically all of which is interchange and differs from that of a steam railroad only in that it is handled by [fol. 264] electric locomotives taking power from a trolley instead of by steam locomotives.

C. P. Howard, Engineer Examiner.

Ex. 1

Information Requested by Mr. C. P. Howard, Engineer Examiner of the Interstate Commerce Commission, Charlotte, N. C., February 14, 1927

1. Just where the extension is to be built.

2. Ownership.

3. Has construction started.

4. Who is going to do the building, the P. & N. or a subsidiary?

5. What proportion of total freight revenue came from freight interchanged with connecting lines, and what from purely local station to station.

Same information in connection with passenger revenue and express revenue.

6. Participation with other railroads in freight and passenger tariffs.

7. Member of the American Railway Association, and governed by their regulations as to per diem, etc.?

8. Member of the Traffic Associations?

9. Freight cars built for interchange and freely interchanged with other roads?

10. Information about weights and power of electric locomotives.

11. Trains operated with locomotives?

12. You have overhead constructions?

13. Information as to the percentage of side tracks to total main line mileage including branch lines.

14. How many miles of main line, including branch lines, have you on private right of way as distinguished from similar mileage on public streets and highways.

15. Schedule of trains showing movement of freight and passenger trains. If all trains now shown on time card something to show representative movements of trains by actual movements.

16. Points of interchange with other steam and electric railroads.

17. Would like to look over Charter.

[fol. 265] Ex. 2

Proportion of Total Freight, Passenger and Express Revenue Derived from Business Interchanged with Connecting Lines and What from Purely Local, Station to Station

Freight

Local (station to station)	$108,572.05	4.75%
Freight interchanged with connecting lines	2,130,843.80	93.12%
Overhead (received from one line and delivered to another line P. & N. intermediate carrier	48,676.13	2.13%
Total	$2,288,091.98	100.00%

Passenger

Local (station to station)	$135,258.97	97.63%
Passenger interchanged with connecting lines	3,280.71	2.37%
Total	138,539.68	100.00%

Express

Express revenue for the year 1926 amounted to $39,440.00. We have no means of separating this as between local or station to station business and interchanged with

connections, as the records are kept by the Express Company, however, the principal revenue is derived from business interchanged with connections.

Passenger and Mail	98.3	$99,099.68
Express	1.7	39,440.00
Total	100.00	$138,539.68

Ex. 3

Weights and Tonnage Rating—Locomotives

	Weight in tonnage	Tonnage rating
Engines 5000 to 5005 (6)	55	800
" 5100 to 5105 (6)	63	900
" 5500 to 5502 (3)	75	750
" 5600 (1)	85	1,200
" 5601 (1)	95	1,200

Percentage of Sidings to Main Line, Including Branches

Ex. 4

	Main line	Second track	Sidings
Charlotte to Gastonia	23.50	3.70	7.92
Spartanburg-Greenwood	89.90	....	21.02
Belmont Branch	3.19	....	1.23
Anderson Branch	11.30	....	1.68
	127.89	3.70	31.85

Recapitulation

Main Line—Track Miles		131.59	80.51%
Sidings—Track Miles		31.85	19.49
		163.44	100.00
Trackage rights over industrial sidings	13.82		
Miscellaneous Spurs	32.53		
Car house tracks	.41		
		46.75	
		210.20	

[fol. 266] Ex. 5-1

Statement of Miles of Track

Showing Miles Operated Jointly with Street Cars; Also Miles of Track in Streets

	Miles of main-line track	Miles of joint operation with street cars		Miles of track in streets	
Charlotte-Gastonia	27.20	8.31	30.55%	2.24	8.24%
Spartanburg-Greenwood.	89.80	....	.....	....	....
Belmont Branch.....	3.19	3.19	100.00%	....	....
Anderson Branch.....	11.30	....	.....	.66	5.84
Total Main Track.	131.59	11.50	8.74%	2.90	2.20%

	Miles of sidings	Miles of joint operation with street cars		Miles of track in streets	
Charlotte-Gastonia	7.92	1.40	17.68%	1.40	17.68%
Spartanburg-Greenwood.	21.02	....	.....	....	....
Belmont Branch.....	1.23	....	.....	....	....
Anderson Branch.....	1.68	....	.....	....	....
Total Sidings....	31.85	1.40	4.40%	1.40	4.40%
Total Main Track and Sidings....	163.44	12.90	7.89%	4.30	2.63%

Ex. 5-2

Statement of Miles of Track

Showing Miles Operated Jointly with Street Cars; Also Miles of Tracks in Streets

	Miles of main track	Miles of joint operation with street cars		Miles of track in streets	
Total main track and sidings	163.44	12.90	7.89%	4.30	2.63%
Miles of trackage rights over industrial spurs.	13.82	2.25	16.28%	1.26	9.12%
Miscellaneous spurs....	32.53	....	.....	....	....
Car-house tracks.....	.41	....	.....	....	....
Grand total.....	210.20	15.05	7.16%	5.56	2.65%

[fol. 267] Ex. 6

Points of Interchange with Railroads

Point of interchange	Connection
Charlotte, N. C.	Southern Railway
Pinoca, N. C.	Seaboard Air Line Railway
Belmont, N. C.	Southern Railway—switching*
Gastonia, N. C.	Southern Railway—C. & N. W. Ry.
Downs, S. C.	Southern Railway—switching*
Greenwood, S. C.	Ware Shoals R. R.
Shoals Junction, S. C.	Seaboard Air Line Railway
Honea Path, S. C.	Southern Railway—switching*
Belton, S. C.	Southern Railway—switching*
Anderson, S. C.	Blue Ridge R. R.—C. & W. C. R. R.
Williamston, S. C.	Southern Railway—switching*
Pelzer, S. C.	Southern Railway—switching*
Piedmont, S. C.	Southern Railway—switching*
Greenville, S. C.	Southern Railway—C. & W. C. Rwy.—G. & N. Rwy.
Greer, S. C.	Southern Railway—switching*
Spartanburg, S. C.	Southern Railway—C. & W. C.—Clinchfield

Ex. 7

Freight and Passenger Revenue, Years 1913-1926, Inc.

Year	Freight revenue	Passenger revenue	Total	% of freight to total	% of passenger to total
1913	$361,280.51	$280,260.58	$641,541.09	56.31	43.69
1914	542,910.56	356,227.53	899,138.09	60.38	39.62
1915	605,123.95	341,936.73	947,060.68	63.89	36.11
1916	742,668.68	401,460.77	1,144,129.45	64.91	35.09
1917	862,414.65	562,973.70	1,425,388.35	60.50	39.50
1918	727,913.17	875,299.72	1,603,212.89	45.40	54.60
1919	653,660.59	621,953.13	1,275,613.72	51.24	48.76
[fol. 268]					
1920	1,031,667.45	680,165.19	1,711,832.64	60.27	39.73
1921	1,215,512.20	490,664.50	1,706,176.70	71.24	28.76
1922	1,426,806.17	478,864.09	1,905,670.26	74.87	25.13
1923	1,887,610.60	446,016.84	2,333,627 44	80.89	19.11
1924	1,835,905.32	324,402.39	2,160,307.71	84.98	15.02
1925	2,172,288.41	226,853.83	2,399,142.24	90.54	9.46
1926	2,288,091.98	179,564.03	2,467,656.01	92.72	7.28
	$16,353,854.24	$6,266,643.03	22,620,497.27	72.3	27.7

*No through routes—merely switching points.

Ex. 8

Exhibit 8 attached to Howard's Report was section 9 of Exhibit 8, a copy whereof is hereto attached.

STIPULATION RE STATEMENT OF EVIDENCE

The parties to the above entitled action, by their respective Attorneys, hereby stipulate and agree that the foregoing statement contains all of the evidence introduced before the court in the trial of said action which is in any way material to the issues and questions as to the jurisdiction and authority of the Interstate Commerce Commission involved therein; and that true and correct copies of Exhibits 1, 7, 8, 70, and 73 therein referred to are hereto attached and made a part hereof.

This the 16th day of May, A. D. 1929.

Piedmont and Northern Railway Co., Petitioner, by W. S. O'B. Robinson, Jr., Attorney. National Association of Railroad and Utilities Commissioners, Intervening Petitioner, by John E. Benton, General Solicitor. United States of America, Defendant, by Elmer B. Collins, Special Assistant to the Attorney General. Interstate Commerce Commission, Intervening Defendant, by Daniel W. Knowlton, Chief Counsel. Southern Railway [fols. 269 & 269a] Company, Intervening Defendant, by L. E. Jeffries, Attorney. Seaboard Air Line Railway Company, Intervening Defendant, by James F. Wright, Attorney. Charleston & Western Carolina Railway Company, Intervening Defendant, by Carl H. Davis, Attorney. Atlantic Coast Line Railroad Company, Intervening Defendant, by Carl H. Davis, Attorney. Louisville & Nashville Railroad Company, Intervening Defendant, by Wm. C. Burger, Attorney. Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, Intervening Defendants, by Jas. J. McLaughlin, Attorney.

ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing narrative statement of the evidence introduced before this court, having been stipulated by counsel for the respective parties to be correct, the same is hereby approved and settled as correct.

This the 23d day of May, A. D., 1929.

Morris A. Soper, United States District Judge.

[fol. 269b] APPLICANT'S EXHIBIT No. 7.

Finance Docket, No. 6208

Witness: Lee

No. 214

An Act, Gen. Assembly State of S. C., Incorporating Piedmont & Northern Railway Company

[fol. 269c] No. 214

An Act Incorporating Piedmont and Northern Railway Company (a Concurrent Resolution Having Passed Both Houses by a Two-thirds Vote in Each Allowing the Introduction of This Bill)

Section 1. Be it enacted by the General Assembly of the State of South Carolina, that J. B. Duke, of Somerville, N. J.; B. N. Duke, of New York, N. Y.; Samuel McRoberts, of New York, N. Y.; W. S. Lee, of Charlotte, N. C.; Ellison A. Smyth and Lewis W. Parker, of Greenville, S. C., and such other persons as they may associate with themselves, and their successors and assigns, be, and they are hereby created a body politic and corporate, under the name and style of Piedmont and Northern Railway Company, and by that name may sue and be sued, make contracts and do all other corporate acts, and may accept, purchase, hold, lease or otherwise acquire and dispose of property, real or personal, use a corporate seal; and in addition to the rights herein enumerated, shall have the rights and powers conferred upon railway corporations by Chapter XLVII of the Code of Laws of South Carolina, and by all amendatory and supplemental Acts. Said corporation may

adopt by-laws, determine the number of directors, which shall not be less than five nor more than twenty-five, divide the same into classes, and prescribe their powers and duties, and the duration of their respective terms.

[fol. 269d] Section 2. That the said railway company is authorized to construct, maintain and operate a line or lines of railway, with one or more tracks, to be operated by electricity or other motive power, beginning at some point in York County, on the North Carolina Line, and extending thence into, across or through the following counties: York, Cherokee, Spartanburg, Greenville, Anderson, Abbeville and Greenwood, or any of them, and by or through the villages, towns, and cities situate in said counties, or any of them, and to the Georgia State line. That said railway company is further authorized to build, construct, maintain and operate other lines of railway connecting with its main-line and into, across or through the following counties, to wit: Union, Laurens, Saluda, Lexington, Newberry, Richland, Chester, or such of them as may be determined upon, and into such other counties and to such other points in this State as may be selected by said corporation, and by and through the villages, towns and cities situate in said counties, including a branch or branches to some town or city, on or near the sea-coast, at either of or between the towns of Georgetown and Port Royal. And said company is authorized to construct and maintain such sidetracks, turnouts, switches, industrial tracks and such other operating appliances and structures as may be found convenient. And for this purpose it shall have the right and power, from time to time, to change the gauge of its tracks and to [fol. 269e] cross the roads, streets and highways of the State, and to construct and maintain culverts, trestles and bridges over and across streams and watercourses in its route, providing that in crossing any navigable stream or watercourse, said corporation shall provide draw bridges for the convenience of boats navigating the same. And said corporation shall have the right to cross, at grade, over or under any other railroad or railway now constructed, or that may hereafter by constructed in this State, subject to the laws, rules and regulations of this State. And said corporation shall have the right and power to erect and maintain such depots, stations, warehouses, elevators, com-

presses, wharves, docks, yards and terminals, and other necessary and convenient establishments and structures along or near its lines of railway for the accommodation of passengers and freight, and shall be entitled to charge and collect reasonable compensation for storage, dockage, wharfage, lighterage, and all labor and services incident thereto, and that said corporation shall have the right and power, in connection with its railway or otherwise, to own, operate, or make traffic arrangements and agreements with one or more lines of steamboats, ferries, ferry boats or other vessels for the transportation of passengers and freight, and may charge and collect reasonable fares and tolls therefor. All the charges, arrangements and tolls provided for herein shall be exercised subject to the regulations adopted by the Railroad Commission. And it may [fol 269f] construct, maintain and operate along its right of way and extending into the villages, towns and cities through or near which it may pass, lines of railway, telephone, telegraph and electric power transmission, with all suitable poles, towers, fastenings and appliances therefor, and shall be entitled to charge and collect reasonable fares and tolls for all messages and for power furnished: Provided, however, That said corporation shall not be entitled to extend said lines along the streets of any village, town or city of this State without first securing the consent of the municipal authorities: Provided, That unless the said corporation shall enter and begin actual construction of its lines in any county into which it is empowered to enter, either expressly or under the general clause of this Act, within ten years from March 1st, 1911, all rights and franchise given to enter such county shall expire.

Section 3. That said corporation shall have the right and power to construct, purchase, or otherwise acquire, maintain and operate street railways, run by electricity or other improved motive power, in the villages, towns and cities through or near which its lines of railway may pass, with one or more tracks and with such wires, poles, supports, pipes, conduits and other apparatus and appliances as may be deemed necessary: Provided, however, That nothing contained in this statute shall be held to authorize the construction and operation of a street railway in any village, town or city of this State, except under or in pursuance of

[fol. 269g] a franchise from, or the consent of, the municipal authorities thereof.

Section 4. That said corporation shall have the right to purchase, lease or otherwise acquire the railway and other property, including the rights and franchises, of any other railroad company or street railway company now in existence or hereafter created, in this State, or in any other State of the United States, and may hold, possess, operate, enjoy, exercise and dispense of the same, and shall also have the right and power to purchase, or otherwise acquire, the stock, bonds, or other securities of any railroad, or street railway corporation, including the right to vote the said stock and to guarantee the payment of dividends, or interest on any shares, stocks, debentures or other securities issued by such corporation, or to aid in the development of the business thereof; and said corporation shall further have the right to make such traffic agreements and operating contracts with other corporations owning or operating railroads or street railways in this or any other State, as may be deemed necessary or advisable for the efficient and economical conduct of the business: Provided, however, That nothing contained in this section shall authorize this corporation to purchase, acquire, or obtain control over any parallel and competing line of railway in this State.

Section 5. That said railway company shall be authorized and empowered to establish such lines of automobiles, cabs or other movable vehicles as may be deemed necessary [fol. 269h] or convenient for the efficient and economical conduct of its business, as aforesaid. And it shall have the right to generate, develop and contract for electric power, and to dispose of such power as may not be needed for its own purposes, unto individuals, corporations or municipalities for light and power subject, however, to the laws of this State.

Section 6. Said corporation shall have the right to enter upon the lands of other persons or corporations for the purpose of making surveys, laying out and locating the route or routes for its railways, street railways, power transmission, telephone or telegraph lines and for its various structures, and shall have the right to condemn lands for its depots, stations, warehouses, terminals, yards and

structures, and right of way for its lines of railway, street railway, power transmission, telephone and telegraph, of such width as may be determined upon by said railway company, not exceeding fifty feet on either side of the center; with the right, however, to protect the said railway and line or lines of wires from trees situate on and near said right of way. The power of condemnation thus vested in said corporation shall be exercised in the same manner and to the same extent as prescribed by the statutes of this State, and particularly by Article IX of Chapter L of the Civil Code of South Carolina and the Acts amendatory and supplemental thereto.

Section 7. That said corporation shall have the power and authority to acquire by gift, devise, purchase or other- [fol. 269i] wise, and to improve and develop such real estate as may be deemed expedient, and to erect, sell, lease or dispose of schools, stores, mills, warehouses, hotels and restaurants and other convenient structures, to lay out and plat its real estate, or any of it, into blocks, lots, squares, town sites, factory sites, parks, amusements or other properties as may be deemed to the best interest of said corporation, together with the right to dedicate to the public use such streets, avenues, alleys, and parks as may be deemed advisable.

Section 8. That this corporation is authorized to do business of carrying passengers, mail, express, merchandise, and other freight, and shall possess the power to borrow money and contract debts, and make and issue its bonds, notes and other evidences of indebtedness in such form as may be determined upon, and to secure the payment of the same by a mortgage or mortgages, and deed or deeds of trust upon any or all of its property, rights, and franchises. The rights herein granted to be exercised in pursuance of the general statutes of this State, and of all Acts amendatory thereof. Said corporation shall further have all the rights, privileges and franchises given unto railway corporations and street railway corporations under and by virtue of the general statutes of this State, and all amendatory and supplemental Acts.

Section 9. That the capital stock of said corporation shall be five million ($5,000,000) dollars in common or pre-

ferred, or partly in each, as may be determined upon by the [fol. 269j] said corporators. The capital stock shall be divided into shares of the parvalue of one hundred ($100) dollars each, payable in money, real estate, stocks, bonds or any other property, or in services, as may be determined upon by agreement between said corporations and the subscribers to or purchasers of said stocks; Provided, That said corporation may from time to time, and as often as may be deemed advisable, increase it- capital stock, or amend its charter in other particulars, upon a vote of the stockholders in the manner and form prescribed by the general statutes of this State, and all amendments and Acts supplemental thereto, upon the payment to the State of the fees provided by law.

Section 10. That a consolidation and merger of the capital stock, property and franchises of Greenville, Spartanburg and Anderson Railway Company with that of Piedmont and Northern Railway Company is hereby authorized upon the following terms, to wit: The directors of said corporations may enter into an agreement under the corporate seal of each of said corporations, setting forth the terms of consolidation, which agreement shall then be submitted to the stockholders of each of said corporations at a meeting of which five days' notice shall be given by publishing said notice in some newspaper published in the city of Greenville, S. C., and if a majority of the stockholders of said companies, respectively, shall by ballot vote for said agreement, then this fact shall be certified by the secretaries of [fol. 269k] said corporations, respectively, under their corporate seals, together with a certified copy of the agreement, and thereupon the agreement and action of said companies shall be duly certified by the Secretary of State, under the seal thereof, and said certified copy shall be evidence of said merger in any judicial proceeding in this State. And thereupon, the existence of said Greenville, Spartanburg and Anderson Railway Company shall be taken and deemed to be merged into that of the Piedmont and Northern Railway Company, which company shall have, possess, enjoy and exercise all the property, real estate and personal, rights, privileges and franchises, and be subject to all the restrictions, liabilities and duties of each of said corporations, as effectually and fully as the said property,

right, privileges and franchises were originally vested in the said Greenville, Spartanburg and Anderson Railway Company. And further, that any company now chartered, or hereafter to be chartered by this or any other State, or the United States, having or authorized to have, lines of railway in any of the towns, villages or cities or counties of this State, or any other State, through or near which said Piedmont and Northern Railway Company passes or proposes to pass with its lines, shall be authorized to consolidate and merge its capital stock, property and franchises with said Piedmont and Northern Railway Company in the manner and upon the terms prescribed in this section for the merger of the Greenville, Spartanburg and Ander-[fol. 269] son Railway Company with said Piedmont and Northern Railway Company, and thereupon said Piedmont and Northern Railway Company shall be entitled to all the property, rights and franchises of said railway or street railway company, and shall be subject to all of its liabilities: Provided, however, That all rights of the creditors of either of the merging companies shall be preserved unimpaired, and the respective corporations may be deemed to continue in existence to preserve the same, and all debts, liabilities and duties of either of said companies shall thenceforth attach to, and be enforcible against, the said Piedmont and Northern Railway Company to the same extent as if the same had been contracted by it: And provided, further, That there shall be paid to this State the fees allowed by law for the dissolution of corporations: And provided, further, That nothing herein shall authorize the consolidation or merger of parallel and competing railway lines in this State.

Section 11. That this Act shall be held and deemed to be a public Act, and shall go into effect immediately upon its approval by the Governor: Provided, That there shall be paid to the Secretary of State, before said corporation shall engage in business, the charter fees chargeable against corporations organized under the general statutes, based upon the authorized capital stock mentioned in paragraph 9 of this Act.

Approved the 24th day of February, A. D. 1911.

[fol. 269m] State of South Carolina, Executive Department

By the Secretary of State

This is to certify the foregoing and hereto attached eight typewritten pages to be a true and correct copy of an Act "Incorporating Piedmont and Northern Railway Company," as taken from and compared with the original now on file in this office, the same being Act No. 214 of the General Assembly of 1911, duly ratified by both Houses of the General Assembly as shown by the endorsements thereon and approved by the Governor on the 24th day of February, A. D. 1911, in attestation of all of which the Great Seal of the State has been affixed thereto.

Given under my hand and the seal of the State, at Columbia, this seventh day of October, A. D., 1914.

(Sd.) R. M. McCown, Secretary of State, by (Sd.) W. B. Dove, Asst. Secty. of State. (Seal.)

[fol. 269n] Applicant's Exhibit No. 8

Finance Docket, No. 6208

Witness, Lee

An Act to Amend an Act Gen. Assembly State of S. C. Incorporating Piedmont & Northern Railway Company Approved Feby. 24, 1911—1/27/27.

[fol. 269o] The State of South Carolina:

At a General Assembly begun to be holden at Columbia, on the second Tuesday in January, in the year of our Lord one thousand nine hundred and twenty-seven, and thence continued by divers adjournments to the — day of ——.

An Act to Amend an Act Entitled "An Act Incorporating Piedmont and Northern Railway Company," Approved the 24th Day of February, A. D. 1911

Whereas a Concurrent Resolution was passed by a two-thirds vote of each House of the General Assembly, allowing the introduction of this bill, therefore

Section 1. Be it enacted by the General Assembly of the State of South Carolina: That an Act entitled "An Act Incorporating Piedmont and Northern Railway Company," approved the 24th day of February A. D. 1911, known as Act No. 214 of the Acts and Joint Resolutions of the General Assembly of the State of South Carolina of 1911, be, and the same is hereby amended as follows: By striking out Section 2 and inserting in lieu thereof the following to be known as Section 2:

"Section 2. That the said railway company is authorized to construct maintain, and operate a line or lines of railway, with one or more tracks, to be operated by electricity or other motive power, beginning at some point on the North Carolina line, and extending thence into, across or through the following counties: York, Cherokee, Spartan- [fol. 269p] burg, Greenville, Anderson, Abbeville, and Greenwood, or any of them, and by or through the villages, town and cities situate in said counties, or any of them, and to the Georgia State line. That said railway company is further authorized to build, construct, maintain and operate its main line of railway and other lines of railway connecting therewith, into, across or through such other counties and to such other points in this State, and into, across or through such other state or states as may be selected by said corporation. And said Company is authorized to construct and maintain such sidetracks, turnouts, switches, industrial tracks and such other operating appliances and structures as may be found convenient. And for this purpose it shall have the right and power, from time to time, to change the gauge of its tracks and to cross roads, streets and highways and to construct and maintain culverts, trestles and bridges over and across the streams and water courses in its route, providing that in crossing any navigable stream or water course, said corporation shall provide draw bridges for the convenience of boats navigating the same. And said corporation shall have the right to cross, at grade, over or under any other railroad or railway now constructed, or that may hereafter be constructed, subject to the laws, rules and regulations with respect to same. And said corporation shall have the right and power to erect and maintain such depots, stations, warehouses, eleva-

tors, compresses, wharves, docks, yards, and terminals, and other necessary and convenient establishments and struc- [fol. 269q] tures along or near its line of railway for the accommodation of passengers and freight, and shall be entitled to charge and collect reasonable compensation for storage, dockage, wharfage, lighterage, and all labor and services, incident thereto, and that said corporation shall have the right and power, in connection with its railway, or otherwise, to own, operate, or make traffic arrangements and agreements with one or more lines of steamboats, ferries, ferry boats or other vessels for the transportation of passengers and freight, and may charge and collect reasonable fares and tolls therefor. And it may construct, maintain and operate along its right of way and extending into the villages, towns and cities through or near which it may pass, lines of railway, telephone, telegraph, and electric power transmission, with all suitable poles, towers, fastenings and appliances therefor, and shall be entitled to charge and collect reasonable fares and tolls for all messages and for power furnished: Provided, however, that said corporation shall not be entitled to extend said lines along the streets of any village, town or city of this State without first securing the consent of the municipal authorities."

Amend further by striking out the period at the end of Section 6, and inserting in lieu thereof a semi-colon, and adding after said semi-colon the following: "and may be exercised in any other state to the extend and in the manner prescribed by the laws of such state," so that said section [fol. 269r] when so amended, shall read as follows:

"Section 6. Said corporation shall have the right to enter upon the lands of other persons or corporations for the purpose of making surveys, laying out and locating the route or routes for its railways, street railways, power transmission, telephone or telegraph lines and for its various structures, and shall have the right to condemn lands far its depots, stations, warehouses, terminals, yards and structures, and rights of way for its lines of railway, street railway, power transmission, telephone and telegraph, of such width as may be determined upon by said railway company, not exceeding one hundred feet on either side of

the center; with the right, however, to protect the said railway and line or lines of wires from trees situate on and near said right of way. The power of condemnation thus vested in said corporation shall be exercised in the same manner and to the same extend as prescribed by the statutes of this State and particularly by Article IX of Chapter L of the Civil Code of South Carolina and the Acts amendatory and supplemental thereto; and may be exercised in any other State to the extend and in the manner prescribed by the laws of such state."

Amend further by striking out Section 9 and inserting in lieu thereof the following, to be known as Section 9:

"Section 9. That the amount of the total authorized capital stock of the corporation shall be two hundred thousand shares (200,000), and may be issued from time to time [fol. 269s] in such number of common and preferred shares, or of either, with the preferred shares having such nominal or par value, or without any nominal or par value, and divided into such classes and having such preference, powers, conditions and limitations attached thereto, all as may from time to time be recommended by the Board of Directors and approved by at least two-thirds (2/3) in amount of each class of the stockholders of the corporation having voting power at a meeting of said stockholders duly called for that purpose; that the common shares of said capital stock shall include the common shares now outstanding and shall have no nominal or par value; that both the common and preferred shares of said capital stock may be disposed of by the Board of Directors from time to time and in such amounts and for such consideration and upon such terms and conditions as the Board of Directors may deem advisable; and that whenever the issued capital stock of the corporation is increased by the issuance of additional capital stock for cash the common stock-holders of record shall be given the preference of taking such increase in proportion to the amount of stock owned by them as such ownership may appear from the records of the corporation; provided that said corporation may from time to time, and as often as may be deemed advisable, increase its authorized capital stock or amend its charter in other particulars in the manner and form prescribed by the General Statutes

of the State of South Carolina and all amendments and acts [fol. 269t] supplemental thereto upon the payment to the State of the fees prescribed by law."

Section 2. That this Act shall be held and deemed to be a public Act and shall go into effect immediately upon its approval by the Governor.

In the Senate — House the — day of Jan. 27, 1927, in the Year of Our Lord One Thousand Nine Hundred and Twenty-seven.

(Sgd.) Thos. B. Butler, President of the Senate.
(Sgd.) John K. Hamblin, Speaker of the House of Representatives.

Approved the 27th day of January, 1927.
(Sgd.) John G. Richards, Governor.

[fol. 269u-w] State of South Carolina, Executive Department

Secretary of State's Office

This is to certify that the foregoing and herewith attached typewritten copy of an Act entitled "An Act to Amend an Act Entitled "An Act Incorporating Piedmont and Northern Railway Company," Approved the 24th day of February A. D. 1911," be true and correct as taken from and compared with the original Act so entitled, now on file in this office.

Further, that said Act was read three times on three several days in each House of the General Assembly, was duly ratified and signed by the President of the Senate and the Speaker of the House of Representatives; and was approved by the Governor on the 27th day of January, 1927, and the great seal of the State affixed thereto.

Witness my Hand and Seal of the State this 28th day of January, 1927.

(Sd.) W. P. Blackwell, Secretary of State. (Seal)

[fol. 270] IN UNITED STATES DISTRICT COURT

In Equity. No. 208

PIEDMONT AND NORTHERN RAILWAY COMPANY, Petitioner,

versus

UNITED STATES OF AMERICA, Defendant

Before Waddill and Northcott, Circuit Judges, and Soper, District Judge

OPINION

SOPER, District Judge:

Piedmont and Northern Railway Company, a South Carolina corporation, filed a petition against the United States, under the provisions of the Act of October 22, 1913, C. 32, 38 Stat. 219, U. S. C. Title 28, Sec. 41, Subd. (28), and Secs. 43 to 48, to enjoin, set aside and annul an order of the Interstate Commerce Commission. A court of three judges was accordingly organized. The order complained of denied to the petitioner a certificate that the present or future public convenience and necessity requires or will require certain extensions of its railroad lines which it desires to build.

The corporation owns and operates a line of electric railway in South Carolina, extending from Greenwood to Spartanburg, a distance of 89.9 miles, with a branch from Belton to Anderson of 11.3 miles; and also a line of electric railway in North Carolina extending from Gastonia to Charlotte, a distance of 23.5 miles, with a branch to Belmont of 3.2 miles; and uses these lines, 127.9 miles in all, in the transportation of persons and property, as a common carrier, in interstate commerce. In the latter part of 1926, the corporation determined to build extensions of its road, 128 miles in length, consisting of a line of about 53 miles in length, running from Spartanburg, South Carolina, to Gastonia, North Carolina, and also a line 75 miles in length [fol. 271] from Charlotte to Winston-Salem in the latter State. This project came to the attention of the Commission and it notified the Railway Company by letter of

March 8, 1927, that it would be expected to file an application for authority to do the work under Paragraphs 18 to 21 of Section 1 of the Interstate Commerce Act as amended by Transportation Act, 1920, 41 Stat. 456, 474, 477-8. The Commission said that in its opinion the railroad was not an interurban electric railway excepted from its jurisdiction by Paragraph 22 of Section 1 of the act, 41 Stat. 478. Accordingly on March 26, 1927, the Railway Company filed an application for a certificate of public convenience and necessity, without prejudice, however, to its right to assert that in this respect it is not subject to the authority of the Commission. Various parties, including the States of North and South Carolina, the Utilities Commissioners thereof, cities and counties along the line of the proposed routes, trade organizations and the National Association of Railroad and Utilities Commissioners, were allowed to intervene on behalf of the petitioner. The Georgia and Florida Railroad, which had theretofore been granted authority to extend its line from Augusta, Georgia, to Greenwood, South Carolina, also intervened on the petitioner's behalf. On the other hand, the Southern Railway Company, the Atlantic Coast Line Railroad Company, the Seaboard Air Line Railway Company, the Carolina, Clinchfield and Ohio Railway of South Carolina, the Clinchfield Northern Railway of Kentucky, the Louisville and Nashville Railway Company and the Charleston and Western Carolina Railway Company were allowed to intervene in opposition to the application. After extensive hearings, the Commission, on April 3, 1928, issued its report in which it reasserted its jurisdiction over the petitioner and determined that the public convenience and necessity did not require the new lines. It showed that both the existing and proposed lines of the petitioner very closely parallel the lines of the Southern Railway Company and that the territory involved is now adequately served by that and other railroads. The application of the petitioner was therefore de-
[fol. 272] nied.

In the case at bar, the National Association of Railroad and Utilities Commissioners has been allowed to intervene on the petitioner's behalf, while the Interstate Commerce Commission and the same railroads which opposed the application before the Commission have been allowed to in-

tervene in support of the Commission's authority and its denial of the petitioner's application.

The case was submitted to the court upon the voluminous record made in the proceeding before the Commission, which for convenience, has been reduced by counsel to narrative form. The evidence tends to show a very considerable demand for the lines of railroad which the petitioner wishes to build arising in the locality to be served, and it is indicated that local service would be improved and the industrial development of the region would be stimulated and enlarged. But on the other hand, there is abundant proof that the present railway facilities are in all substantial particulars adequate and satisfactory, and that the increased business which it is confidently predicted that the Piedmont and Northern, if extended, would enjoy, would be taken in large measure from the steam railroads of the locality. Indeed it is conceded that there is substantial evidence to support the Commission's finding of fact, and that it is binding if the Commission had jurisdiction of the controversy. The rule is clearly stated by Judge Parker, speaking for a similar statutory court in Anchor Coal Co. vs. U. S., 25 F. (2d) 462, 471. He said:

"Much has been said as to the binding effect of the order entered by the Commission, but the law with regard thereto is well settled. If the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence, nor consider the wisdom of the Commission's action, which, within the scope of its jurisdiction, is conclusive, unless there be some irregularity in the proceeding or some error in the application of rules of law. Chicago R. I. & Pac. Ry. vs. U. S., 274, U. S. 29; Virginia Ry. Co. vs. U. S. 272 U. S. 658; Western Paper Makers' Chem. Co. vs. U. S. 271 U. S. 268. If, however, in making the order complained of, the Commission has exceeded its powers, or has proceeded upon an erroneous theory of law, or if its action is so manifestly arbitrary and unreasonable as virtually to transcend the authority conferred upon it, the courts are not bound by its action. Southern Pacific [fol. 273] Co. vs. I. C. C., 219 U. S. 433; I. C. C. vs. Union Pacific Co., 222 U. S. 541; U. S. vs. N. Y. C. R. R., 263 U. S. 603; U. S. vs. New River Co., 265 U. S. 533."

Consequently, the case turns on whether the petitioner was excluded from the authority conferred on the Commission by Paragraph 18 of Section 1 of the Act by the express terms of Paragraph 22. They provide:

"18. After ninety days after this paragraph takes effect, no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction * * * of such additional or extended line of railroad. * * *"

"22. The authority of the Commission (so) conferred shall not extend to the construction * * * of street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Two substantial questions arise:

(1) Did the petitioner, within the meaning of paragraph (18), undertake the proposed extension of its lines before the expiration of ninety days after February 28, 1920, when the Transportation Act went into effect?

(2) Is the petitioner, within the meaning of paragraph (21), an interurban electric railway which is not operated as a part of a general steam system of transportation?

The evidence relating to the first question shows clearly that the plan for a continuous line of electric railway through the Piedmont section of North and South Carolina, from Greenwood and Anderson on the south, to Durham or Winston-Salem on the north, was conceived long before the year 1920. As early as 1910, a group of men, headed by the late James B. Duke and William S. Lee, now President of the Piedmont and Northern, having realized the possibility of a great industrial development in this section, in connection with the use of hydro-electric power, formulated a project to build a high speed electric railroad to connect with the street railway system in the cities en-

route. The plan was announced to the public in 1910, and various steps were taken to carry it into effect. Thus the Piedmont Traction Company was incorporated on January 6, 1910, under the general laws of North Carolina, to oper- [fol. 274] ate street railways by electricity or other power, extending not more than 50 miles from Gastonia. It constructed and later conveyed to the petitioner its present line between Gastonia and Charlotte. On March 10, 1910, the Greenville, Spartanburg, and Anderson Railway Company was incorporated, with like provision as to motive power, under the general laws of South Carolina. It acquired an interurban electric railway between Belton and Anderson, constructed a line between Greenwood and Greenville, and later conveyed both to the petitioner.

On January 10, 1911, J. B. Duke, W. S. Lee and other interested persons, as managers, entered into an agreement called the "Piedmont Syndicate" with certain subscribers to acquire, by purchase or construction, a system of railways to carry passengers and freight in the several counties in North and South Carolina, through which the present and proposed lines of the petitioner run. Stock was offered to the public, and it was explained that it was proposed to build such a line and that the Syndicate was formed to buy certain lines already built which would be suitable to carry out the project. Large powers were conferred upon the managers, with discretion to determine from time to time whether it was for the interest of the Syndicate to proceed with the project or abandon it.

The Piedmont and Northern Railway Company was incorporated by special act of the General Assembly of South Carolina, approved February 24, 1911, with a capital stock of $5,000,000, with power to construct and operate a line or lines of railway, to be operated by electricity or other motive power, beginning at a point on the North Carolina boundary line and extending through certain counties in South Carolina to the Georgia line. The condition was imposed that unless the corporation should commence actual construction of its lines in any of the counties mentioned within ten years from March 1, 1911, all rights to enter such county should expire. Power was given to construct, acquire and operate street railways run by electricity [fol. 275] or other motive power. The consolidation of the new company with the Greenville, Spartanburg and Ander-

son Railway Company and with any other railway company chartered in any State through or near which the Piedmont and Northern proposed to pass, was expressly authorized.

About the same time, the same interests acquired street railway systems in Anderson and Greenville, South Carolina, and Charlotte, North Carolina, and secured franchises and permits in a number of towns through which the lines were to be extended. In 1913, the Winston-Salem Street Railway system was acquired.

Further evidence of an early intention to build the continuous line described is found in certain contracts executed from 1910 to 1914 between the petitioner and one or another of the intervening railways, in which permission was granted to the Piedmont and Northern to cross or use existing lines. Arrangements were made for the division of rates in the interchange of freight business.

The actual construction of the present lines took place between 1912 and 1914. The line from Gastonia to Charlotte was completed in July, 1912; that from Greenwood to Greenville in November, 1913, and that from Greenville to Spartanburg in April, 1914.

A mortgage was executed by the Piedmont and Northern on July 1, 1914, to secure a bond issue of $50,000,000. It covered the existing lines and those afterwards to be acquired or constructed. It provided for the immediate issuance of $10,000,000 of bonds against existing lines, and for the issuance of the remaining $40,000,000 from time to time, as and when other connecting lines should be constructed.

As a matter of fact, no additional lines have been constructed since the completion of the line from Greenville to Spartanburg in April, 1914, although some surveys of the proposed line in North Carolina from Gastonia, south, [fol. 276] and Charlotte, north, were made in 1916, and some properties in Charlotte were purchased in the same year. It is explained that a number of circumstances prevented an earlier completion of the original project. The World War began in the summer of 1914. The United States entered it in April, 1917. The Piedmont and Northern Railway was taken over by the United States and operated under federad control until March 1, 1920. When the road was returned to its owners, it was not in satisfactory condition and the first step was to rehabilitate it. New surveys

were made during the latter part of 1923 and in the year 1924. It was thought that the work would begin in 1925, but on October 28, 1925, J. B. Duke died and construction of the road was deferred until matters connected with his various interests could be adjusted. Finally on November 3, 1926, the Board of Directors resolved to call a meeting of the stockholders, to be held on December 8, 1926, to consider the matter, and at this meeting the construction of lines between Spartanburg and Gastonia, and between Charlotte and Winston-Salem was authorized. It was also resolved to secure an amendment of the charter of 1911 in regard to the amount of capital stock and the removal of the limitation of ten years already mentioned. These matters were covered by an act of the South Carolina legislature of January 27, 1927.

The petitioner, relying upon this history of its activities, and upon the principle of law laid down in Detroit Terminal R. Co. vs. Pennsylvania-Detroit R. Co., 15 F. (2d) 507, 509, contends that it had actually commenced construction in a substantial way before 1920, by the acquisition and building of its present lines; and that since this work was but a part of an entire unitary project, never abandoned, it must be held that the petitioner had undertaken the construction of the proposed extension long before Paragraph 18 of Section 1 of the Act was passed.

The Commission has given effect to the exception in Paragraph 18 in the public convenience applications of the following roads; Texas, Oklahoma & Western R. R., 67 I. C. C., 484; Uvalde & Northern Ry. Co., 67 I. C. C. 554; [fol. 277] Gulf Ports Terminal Ry. Co., 71 I. C. C., 759; San Antonio & Aransas Pass. Ry., 111 I. C. C. 483. It also passed an order on May 25, 1920, three months after the effective date of the Act, in which it notified all carriers contemplating or engaged in work of construction, to notify the Commission of the facts and circumstances in order that it might determine whether the work had been actually undertaken as contemplated by Paragraph 18, and whether a certificate of convenience and necessity would be required. It announced that if the projected extension or construction should have been actually undertaken in good faith within ninety days after the approval of the Act, a certificate would not be required; but that the undertaking must em-

brace not merely a purpose or intent to extend and construct, but also the actual doing in good faith of acts calculated to complete and effect such purpose. It said that a mere provision in a charter or prospectus, or the making of a preliminary survey, would not in its opinion constitute an undertaking. The Piedmont and Northern made no response to this order.

We think it is clear upon the facts of this case that the Piedmont and Northern had not undertaken the extension of its lines now proposed within the time required by the Transportation Act. Neither it nor its promoters had been under any obligation to connect its lines of railroad at any time since the plan was first announced in 1910. Neither the corporation nor any one else in its behalf had authorized the construction of a single mile of tract between April, 1914, and the passage of the stockholders' resolution on December 8, 1926. During an interval of nearly six years between March 1, 1921, and January 27, 1927, when its charter was amended, the corporation was without power to construct the South Carolina part of the extension between Spartanburg and Gastonia, since it had suffered this power to lapse, through failure to exercise it. The evidence does show beyond question that the project of a continuous line from Greenwood, on the south, to Durham or Winston-[fol. 278] Salem, on the north, was conceived as early as 1910, and that parts of it were actually completed by the year 1914. But it does not follow that the plan was at any time undertaken as an entirety. It was hoped and believed that it would prove practicable to complete the whole, and the idea was never abandoned; but the purpose so to do remained tentative and ambulatory, and as it turned out, dependent for its consummation upon many considerations over which the corporation had little or no control. The Century Dictionary defines the word "undertake" as "to lay oneself under obligation to perform; to engage it; enter upon; take in hand; begin to perform; set about; attempt." We think that the term should be given this ordinary meaning in the paragraph under discussion, and as thus defined, it is obvious that although the Piedmont and Northern had not only undertaken but completed its present lines of railway, it had not so much as undertaken the construction of the proposed lines before the authority conferred upon the

Commission by Paragraph 18 to regulate railroad building went into effect. To conceive and to intend to perform is not to undertake.

We come then to consider whether the Piedmont and Northern is an interurban electric railway not operated as part of a general steam railroad system of transportation. This inquiry may be speedily reduced to the single question whether the Piedmont and Northern is an interurban railway. It is obviously electric, and there can be little doubt that it is not operated as part of "a general steam railway system." The operation of the road, it is admitted, is entirely in the hands of the Piedmont and Northern Railway Company, independent of any other railroad corporation; and it is not a part of any other system of transportation unless that phase is taken in a broad sense to mean the whole aggregation or net work of railways of the United States which are physically connected for the interchange of business. In this sense the petitioner is a part of a railroad system, since, as will presently appear, it has physical connections and through traffic arrangements with steam roads which give it access to all parts of the [fol. 279] country. In this sense the term "railway system" has been used in a number of cases by the Supreme Court, as for instance in Texas & Pac. Ry. vs. Gulf, Etc. Ry., 270 U. S. 266, where Mr. Justice Brandeis said; (p. 277). "By that measure, (Transportation Act, 1920), Congress undertook to develop and maintain, for the people of the United States, an adequate railway system." See also Wisconsin R. R. Com. vs. C. B. & Q. R. R. Co., 257 U. S. 563; 589; Dayton-Goose Creek Rwy. vs. U. S., 263 U. S., 456, 478.

But, on the other hand, the term has also been used in a more restricted sense both by Congress and by the Federal Courts, and in this sense, something more than physical connections and through traffic arrangements must exist between railroads to constitute them parts of the same railway system. There must be also unity of ownership or unity of management and control. For example, the Federal Possession and Control Act of August 29, 1916, 39 Stat. 645, empowered the President, through the Secretary of War, to take possession and control of any system or systems of transportation, and to utilize them for purposes connected with the emergency of the war. Again, the Fed-

eral Control Act of March 21, 1918, 40 Stat. 451, was entitled: "An Act to provide for the operation of transportation systems, while under federal control, for the just compensation for their owners, and for other purposes." This act was considered by the Supreme Court in Missouri-Pacific R. R. Co. vs. Ault, 256 U. S., 554, 557, where it was said:

"By the establishment of the Railroad Administration and subsequent orders of the Director General, the carrier companies were completely separated from the control and management of their systems. * * *"

Referring to Section 10 of the act which provided that carriers while under federal control should be subject to certain laws and liabilities, the court said (p. 559):

"Here the term "carriers" was used as it is understood in common speech; meaning the transportation systems as distinguished from the corporations owning or operating them. Congress had in Section 1 declared that such was its meaning. The President took over the physical proper-
[fol. 280] ties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such. * * * Each system was required to file its own tariffs * * *. Each was required to take an inventory of its materials and supplies * * *. Each federal treasurer was to deal with the finances of a single system * * *."

See also Hines vs. Dahn, 267 Fed. 105, 108-9; Davis vs. Donovan, 265 U. S., 257; Davis vs. Alexander, 269 U. S. 114.

The Transportation Act of 1920 was intended, amongst other purposes, to put an end to the federal control of railroads and was entitled "An act to provide for the termination of federal control of railroads and systems of transportation, &c." Section 200, 41 Stat. 457, provided that federal control should terminate on March 1, 1920, and that the President should then relinquish possession of all railroads and systems of transportation under federal control. Section 407, 41 Stat. 480, amending Section 5 of the Interstate Commerce Act, provided in Paragraph 4 that the Commission, as soon as practicable, should provide a plan

for the consolidation of the railroad properties of the United States into a limited number of systems. The provisions of this and subsequent paragraphs of the section involve the idea of unity of ownership, control and management over each of the several systems of transportation.

Section 422, 41 Stat. 488, adding Section 15a to the Interstate Commerce Act, confers upon the Commission the power to prescribe just and reasonable rates for railroad carriers and contains the so-called recapture provision by which the excess income of railroads is returned to the United States. Paragraph 6 provides that "the value of railway property and the net railway operating income of a group of carriers which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system." The Interstate Commerce Commission applied this section in Excess Income of St. Louis & O'Fallon Ry. Co., 124 I. C. C. 3, 11, and held that in the absence of any contrary indication, it [fol. 281] must be assumed that Congress had in mind the usual meaning of the word system as applied to railroads, implying an operating relationship and unity and involving (1) common control, (2) common management and (3) operation as a system. A similar construction was given by the Commission to the same term in Paragraph 22 of Section 1 of the Act now under consideration, in the cases of the Michigan United Rys. Co. 67 I. C. C. 452, and Sacramento Northern Ry. 71 I. C. C. 653. These rulings in our opinion were correct. They are borne out by the phraseology of the excepting clause in Section 15a wherein Congress excluded from the authority of the Commission "interurban electric railways, unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight." If the broad significance for which petitioner contends should be given to the first clause in this alternative, there would be no need for the second, for it is a matter of common knowledge that physical connections are established between the two kinds of railway to enable the interurban to engage the more readily in the general transportation of freight.

It is contended that the presence of the word "General" in the phrase "general steam system of transportation,"

requires that the broader of the two meanings we have discussed should be applied. But the word "general" may be given proper weight if it is referred to the kind of transportation, excluding railroads engaged in a special or local service, and indicating those engaged in general transportation. We conclude that the Piedmont and Northern is not a part of a general steam system of transportation, within the meaning of Paragraph 22, Section 1.

But the petitioner must also show, in order to escape the Commission's control, that it is an interurban railroad, a matter which can only be determined by a consideration of the character of its construction and equipment and the business which it conducts. The petitioner says that the distinguishing feature of an interurban road is a certain [fol. 282] type of local service which is rendered by no other class of carrier; and so long as a road retains this feature, it remains an interurban, no matter how much it may resemble steam lines in the scope and character of its other activities. Let us then first consider the local passenger and freight service of the Piedmont and Northern which it renders on its present lines, and would also expect to give in greater measure should they be doubled in length by the proposed extensions. In the testimony before the Commission, this service was compared with the local servive of the Southern Railway, a parallel steam railroad admittedly of the first class.

The existing lines of the Piedmont and Northern have connections with the street railway systems of the cities which it serves, acquired either by direct ownership or by contracts for trackage rights. Thereby its passenger cars within the cities enroute become street railway facilities. Between the cities there are frequent stops for passengers at an average distance of 1.2 miles apart—that is to say, 106 stops in 128 miles of road. 49 passenger trains daily traverse various parts of the line. There are more daily trains and more frequent stops than on the corresponding mileage of the Southern Railway. Furthermore the spacing between the trains is more uniform. The passenger cars are motivated by self-contained motor units, and are lighted from a trolley. By reason of their equipment, they are not unacceptable upon steam lines.

The use of city streets for the collection and delivery of freight is a peculiar characteristic of the Piedmont and

Northern and other interurban roads. Its electric locomotives and cars are constructed to take the sharp curves and steep grades peculiar to the city streets. It is even possible for electric locomotives to go inside a building where a steam locomotive cannot go. The switching service thus made available in the cities is extremely convenient for industries of all sorts, including factories, whosesale houses and even retail houses. The street railway lines are used largely for delivery and pick up service; [fol. 283] but the bulk of the through traffic does not move over the city streets.

Local freight service between cities on the petitioner's lines is also more flexible and convenient than that rendered by the steam railways. There are more daily freight trains in small units. 18 trains which average 14 loaded and 6 empty cars, are operated daily. There are more frequent stops on the Piedmont and Northern than on the Southern in local station to station movement of freight. In addition, there are local switches for industrial plants, so that freight is delivered and picked up all over the line. In the delivery of less than car load freight in short distances up to sixty miles, there is more expedition and greater dispatch than in the handling of similar business on the Southern. The electric locomotives for the movement of freight are of somewhat lighter character than those employed on the steam roads and are unfit for long haul heavy load traffic such as that hauled by the electric locomotives on the Virginian railway. The cars and locomotives are so equipped that they can be used either upon a voltage of 1500 d. c. between the cities or 600 d. c. inside the cities.

It is of course true that in a measure steam railroads render the same sort of local freight service as the Piedmont and Northern Railway. Thus the evidence shows that the Southern Railway, as well as the other steam railroads, runs daily local freight trains in a station to station movement; and serves mills and factories enroute by numerous industrial sidings or switches. At many points on steam roads, in or near cities, there are curves as sharp as any on the Piedmont and Northern, smaller engines of a special type being used in some instances to render the necessary switching service. The difference between the local freight service of the Piedmont and Northern and

that of the steam railroads consists chiefly in the use of the street railway systems to gather up and deliver freight in the cities, the greater number of local freight stations on its lines between cities, the operation of its freight trains in [fol. 284] smaller units and with greater frequency, and of a speedier delivery of local freight between nearby points.

The local passenger and local freight business thus described give to the road the peculiar features upon which the petitioner relies to distinguish it from the ordinary steam railroad. But this business constitutes only a small part of the petitioner's operations. Far greater is its general freight business, made possible by interchange relations with steam trunk lines in the south through which it is connected for the receipt and delivery of property with vast sections of the United States. Upon this phase of its activities, the Commission, in its opinion, and the opponents of the petitioner in this case depend to show that the road is not merely an interrurban electric railway, but something far more important in the business of transportation. In the nature of things, its extra-interurban operations consist of freight movements. This is so because the great bulk of its passenger traffic is local and is carried in cars which cannot be used on steam roads; while its freight cars can be and are freely interchanged with connecting steam railroads.

The road bed, rolling stock and equipment are of such a character that it is well suited to cooperate with steam railroads in the transmission of freight to distant points. Freight trains of 45 cars, using 2 locomotives, are not unusual; the average train is 20 cars. Most of the freight traffic is handled in cars owned by steam railroads but the petitioner owns 165 automobile cars and 99 other box cars, all of which are of ordinary steam railway type and move freely on foreign roads. Altogether, there are 337 cars. The construction is that of a standard steam railway. Expensive grading was undertaken; and grades and curves are suitable for heavy traffic. Rails are of 80 lb. section. Bridges were made as strong as those on the Southern Railway, and the locomotives purchased were heavier than was necessary for merely local traffic. The purpose of the builders from the beginning was to construct a line of railroad which would aid in the industrial development of the

[fol. 285] Piedmont region and serve as a means by which mills and factories could find connections with the steam railroads of the country for the delivery of freight. Points of contact with carriers extending to outside territory have been obtained in as large a number as possible.** Traffic agreements have been made with the Seaboard Air Line, the Southern Railway and other roads with reference to rates and the division of revenue received in the interchange of traffic. While street railways have been used for local deliveries, the through freight does not pass through the cities, but is carried over additional lines which run around the cities and avoid the city streets.

The business methods of the road are similar in many respects to those of steam railroads. It is a party to the tariffs of the steam roads and to the uniform express contract of the American Railway Express Company. It is a member of the American Railway Association, the Southern Freight Association and other traffic organizations of the steam roads. It is represented by powers of attorney in nearly every tariff bureau of the United States and has 502 published tariffs. It follows the methods of steam roads in matters of rate divisions, interline billing, claim settlements and in all of its relations with shippers and consignees. It publishes a tariff directory which is on file with the Interstate Commerce Commission. It has a general agent in New York, a commercial agent at Atlanta and at all of its connecting points.

[fol. 286] The entire territory east of the Mississippi is tributary to the road in that freight originating on and destined to it is derived from or moves to every part of that section of the United States. While the matter had not

---

** The Piedmont and Northern has the following points of interchange on through routes in addition to switching points with steam railroads:

Points of Exchange	Connections
Charlotte, N. C.	Southern Railway
Pinoca, N. C.	Seaboard Airline Railway.
Gastonia, N. C.	Southern; C. & W. C. Ry.
Greenwood, S. C.	Seaboard Air Line Ry.
Shoals Junction, S. C.	Ware Shoals R. R.
Anderson, S. C.	Blue Ridge R. R. and C. & W. C. Ry.
Greenville, S. C.	Southern; C. & W. C. Ry; G. & N. Ry.
Spartanburg, S. C.	Southern; C. & W. C. Ry.; Clinchfield

been studied in detail, the evidence tended to show that the road also sends freight beyond the Mississippi to the Pacific coast and to New England.

The distribution of operating revenues very clearly tells the story. Petitioner's witnesses, speaking in round figures, state that 92% of the revenue is derived from freight and only 8% from passenger traffic. The detailed figures for 1926 show even a greater disparity.** The contrast between the revenues from local business and that from business interchanged with steam roads in 1926 is equally striking. While 97.63% of the passenger revenue was derived from local traffic, and only 2.37% from interchange, the reverse is true with revenues from freight of which only 4.75% came from local station to station movement and 95.25% from traffic handled jointly with steam roads. Of 72,886 loaded cars handled, 68,370 were interchanged, most of them in interstate movement, reaching all parts of the United States.

[fol. 287] The proposed extensions would not alter the character of the petitioner's business. There would be the same local service in the transportation of passengers and freight since the railway would connect with street railways of the cities enroute. At the same time the interchange of

---

** Operating Revenues of the P. & N. for the year 1926

Freight

	Per cent	
Local station to station	4.75	$108,572.05
Freight interchanged with connecting lines	93.12	2,130,843.80
Overhead or bridge traffic	2.13	48,676.13
		$2,288,091.98

Passenger

Local station to station	97.63	$135,258.97
Passengers exchanged with connecting lines	2.37	3,280.71
Total Passenger		$138,539.68
Total freight	90.90	$2,288,091.98
Total passenger	5.50	138,539.68
Express revenue	3.60	39,440.00
Mail		897.00
Other sources	....	50,393.00
Total revenues		$2,517,361.66

freight business with steam railroads would be greatly increased. Indeed if the road should be completed so as to form a continuous interstate line in North and South Caroline, it would constitute the interior connecting link in a new joint through route and in effect, a new trunk line will be formed in addition to those now provided by the systems of the Southern, the Seaboard and the Atlantic Coast Line; for the Piedmont and Northern would then connect with the Georgia and Florida at Greenwood, South Carolina, on the south, and with the Norfolk & Western at Winston-Salem, North Carolina, on the north. Numerous new connections with steam roads would then be made and many new points in distant sections of the country would become accessible; and the railway would become to an increased extent an integral part of the great interstate railway system of the country.

The amount and character of the new business which would be done in the first year of the construction of the extensions has been estimated by officials of the petitioner as follows:

Freight	$3,597,384.00
Passenger	196,502.15
Express	70,260.76
Miscellaneous	25,869.66
	$3,890,016.57

During the succeeding five years, an increase each year of 8.4% over the preceding year would be expected.

It will be observed that the existing predominance of freight over passenger revenues would continue. It is estimated that the freight traffic would have its origin in the following manner:

Local traffic having origin and destination on the Railway's lines	21%
Traffic originating beyond and destined to the Railway	44%
Traffic originating on the Railway and destined to points beyond	20%
Overhead or bridge traffic	15%

[fol. 288] The proportion of bridge traffic estimated shows that it would be still of minor importance as compared with

the traffic which originates on or is destined to points on the Railway. The opposite is true of the Southern Railway in the Piedmont District.**

Much testimony was offered to show that the expected increase in revenue would be accomplished at the expense of the Southern and other intervening railroads, particularly since it is natural to suppose that the influence of the interests associated with the great fortune left by the late J. B. Duke would be exerted in the petitioner's behalf. This consideration is not material to the decision of the question before the court except insofar as it constitutes another circumstance tending to prove that the new business of the petitioner would not be of a local character but would be derived in great measure from the carriage of long distance freight, handled in competition with steam railroads.**

The conclusion of fact to be drawn from this recital of the business of the Railways was set forth with substantial accuracy in 1920 by the President of the corporation, in a statement to the Interstate Commerce Commission. He [fol. 289] was seeking to secure for his road the same increase of intrastate rates and fares as had been allowed the steam railroads in South Carolina, under Section 15a of the Interstate Commerce Act. To support his plea, he said: "The Piedmont and Northern Railway is an electrically operated railroad in that it employs electric locomotives instead of steam locomotives and that is the only distinction between it and the steam roads." He further showed that the Railway was an interstate carrier in the fullest sense of the word in competition with the steam trunk lines of the South for both intrastate and interstate business.

** The report of the Commission contains the following:

"The estimated cost of construction is $6,684,377, for the Charlotte-Winston-Salem line, and $4,954,088 for the Gastonia-Spartanburg line, a total cost, without equipment, of $11,638,465. It is expected that 18 new 60-ton locomotives, costing $75,000, each, will be required for freight service for the first year, and five more locomotives of the same type for the fifth year. The applicant represents that the passenger and freight cars which it now owns are ample to provide for its present needs, but that 10 additional passenger cars and probably 200 freight cars of the present type may be required after five years. The applicant will continue to depend on the steam roads for freight cars. The figures presented in these estimates show clearly the minor importance of passenger traffic, or of any ordinary interurban movement."

Testimony to the same effect was given in the case at bar by the Railway's traffic manager. He stated that the Railway is a distinctly interurban railroad-plus, and that it performs all the characteristic services of an interurban railroad and equals that of standard railroads in other respects. This may be taken as an accurate summary of the situation, if there be added the admitted fact that the service which it renders in similitude to that of standard railroads constitutes by far the greater part of its activity.

The Interstate Commerce Commission found that except for the relatively unimportant passenger traffic, the functions of the Railway's line and its methods of operation do not differ materially from those of a steam road in any essential particular except in the use of electric power. It therefore held that the Railway, as proposed to be extended, would be "a commercial railroad operated by electricity and not an electric interurban line within the meaning of Paragraph 22 of Section 1." It remains only to be determined whether this conclusion of law is justified upon the facts which we have outlined.

The argument advanced by the petitioner to meet the situation created by the dual nature of its activities may be summarized as follows: Since the Piedmont and Northern performs the characteristic service, it is entitled to the [fol. 290] designation of an interurban railroad and hence comes within the exception of Paragraph 22 of Section 1, no matter what else it may do in the field of transportation. Congress, in dealing with interstate commerce, has always drawn a line of demarcation between matters of national import and those primarily of local concern and has left the latter to State legislation and control so far as it was consistent with the interests of the nation. See Illinois Central R. R. vs. Public Util. Com., 245 U. S., 493, 510. The people of the United States are principally dependent upon interstate carriers owning and operating general steam railroad systems of transportation and lines operated under their control. But the service of independent interurban electric railways is primarily a local service and they usually touch the main channel of interstate commerce merely as feeders to steam railroad systems. Therefore whilst constantly enlarging the authority of the Commission over steam carriers, Congress has felt that the local

interest is paramount in matters affecting the development of interurban railways and has left them to the regulation of State Utility Commissions. Thus divers provisions are found in the acts of Congress pertaining to interstate carriers expressly excluding interurban railways from the control of the Commission, and in these statutes, the term "interurban" has been used, in the same sense as in the opinions of the Commission and the courts, to indicate not only electric railways of small mileage, confined chiefly to local business, but also to describe roads of even greater extent than the Piedmont and Northern.

This discussion necessarily involves a consideration of the acts of Congress which relate to electric railways—particularly the Transportation Act of 1920, whereby Paragraphs 18 to 22 of Section 1 of the Interstate Commerce Act were enacted. The general purpose of the Transportation Act and of the paragraphs in question, was made clear by the Supreme Court in Texas & Pacific Ry. Co. vs. Gulf &c. Ry. Co., 270 U. S. 266. The court was called upon to de- [fol. 291] cide whether certain new trackage proposed by a carrier would constitute an extension of its line into new territory, requiring a certificate of public convenience and necessity under Paragraph 18, or, as the carrier claimed, a spur or industrial track covered by the exception in Paragraph 22. In support of its contention, the carrier cited certain instructions issued by Commission differentiating branches from spurs, and pointed to uses made of these terms by courts, by the Commission, and by State Legislatures.

The Supreme Court said (p. 277):

"A truer guide to the meaning of the terms extension and industrial track, as used in Paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity and conservation of the financial resources, of individual carriers, is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the

building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See R. R. Com. vs. C. B. & Q. R. R. Co., 257 U. S. 563; The New England Divisions Case, 261 U. S. 184; The Chicago Junction Case, 264 U. S. 258; R. R. Com. vs. Southern Pacific Co., 264, U. S. 331. The Act sought, among other things, to avert such losses."

"When the clauses in Paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, "spur," industrial, team, switching or side tracks * * * to be located wholly within one State." Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated, are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of Paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or in- [fol. 292] dustrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construc-

tion. The Hale-Cement Line is clearly an extension within this rule."

Now it is obvious that the purpose of the law will be defeated by too liberal an interpretation of the term "interurban electric railway." It could not be given the broadest of all meanings for it would then comprehend any railway using electric power which runs between cities, without regard to the character or extent of its business. The electrification of steam roads in 1920 had already progressed to a considerable extent and it cannot be supposed that it was the intent of Congress to except all railroads which should adopt electric motive power from the control of the Commission over new constructions and extensions. On the contrary, it is an elementary rule that exceptions from the general policy embodied in a statute are to be strictly construed and are not to be so interpreted as to destroy its remedial purpose. Spokane & Inland R. R. v. U. S., 241 U. S. 344, 350. Admitting the general rule, the petitioner nevertheless says that the total amount of business done by interurban electric railways is relatively small; and that when the terms of the several statutes dealing with them are fairly considered, it is impossible to escape the conclusion that Congress intended to exclude such a railroad as the P. & N. from the purview of the statutory provisions now under consideration. The desirability of leaving the management of local concerns to the regulation of State authorities outweighed any danger to the transportation system of the country.

The history of the acts of Congress which have dealt with electric railways is disclosed in the decisions of the Supreme Court in Omaha Street Ry. vs. I. C. C., 230 U. S. 324, and U. S. v. Village of Hubbard, 266 U. S. 474. In the first case it was held that although the original Interstate Commerce Act of February 4, 1887, 24 Stat. 379, applied in terms to all carriers engaged in the transportation of passengers or property by railroad, nevertheless street railways for passengers only, as they existed in 1887, although [fol. 293] engaged in the carriage of passengers across State lines, were not within the contemplation of Congress and were not subjected to the jurisdiction of the Interstate Commerce Commission. Referring to interurban railways, the court said at page 337:

"But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight."

In the Village of Hubbard case, it was decided that by reason of the generality of the language of the original Act, which declared in Section 1 that its provisions should apply to any common carrier engaged in the transportation of passengers or property by railroad, the Interstate Commerce Commission was given jurisdiction over the interurban electric railways engaged in interstate commerce so as to require an increase of intrastate railway fares which subject interstate commerce to unjust discrimination. It was shown that the development of interurban roads became general about 1902, and that the authority to regulate them has been consistently exercised by the Commission for many purposes, although no specific reference to electric railroads was made prior to the amendment of the Act of June 18, 1910. The practice of the Commission in making no distinction between railroads operated by steam and those operated by electricity was approved.

Congress has been careful, however, in various enactments, to distinguish between general steam railroads and interurban electric railroads, and also between members of the latter class with reference to the character of business done. In a number of instances, electric railroads have been excluded from the benefits provided or the authority conferred upon the Commission by the statutes.**

[fol. 294] **The Act of June 18, 1910, Ch. 309, 36 Stat. 539, 551, 552 provided that "the Commission shall not * * * establish any through route classification or rate between street electric passenger railways, not engaged in * * * transporting freight in addition to their passenger and express business, and railroads of a different character." This provision, with immaterial amendments, was reenacted as Section 15, Paragraph 3 of the Transportation Act of 1920, 41 Stat. 485. The Federal Control Act of March 21, 1918, 40 Stat. 451, provided for the administration of the transportation systems taken over by the President during the emergency of the war under the Act of August 23, 1916, 39 Stat. 645. Section 1, 41 Stat. 453, declared that certain carriers should be considered as within

[fol. 295] It is apparent from these enactments that the carrier described by Congress as an interurban electric railway is one which may have one or more of the following characteristics: (1) It may be operated as part of a general steam railroad system of transportation; (2) It may have as its principal source of operating revenue, passenger traffic or sale of power, heat and light; (3) It may have as its principal source of operating revenue, freight traffic; (4) It may be engaged in the general transportation of freight; (5) It may make through traffic arrangements with steam railroads and thereby increase its freight business.

Moreover, it is clear that engagement by an interurban electric railway in the general transportation of freight does not of itself bring the carrier within the jurisdicition of the Commission over the construction and extension of railroad lines. No other conclusion can fairly be drawn from the fact that an interurban electric railway, engaged

---

federal control, provided that nothing therein should be construed "as including any street or interurban electric railway which has as its principal source of operating revenue, urban, suburban or interurban passenger traffic, or sale of power, heat and light, or both." The Transportation Act of February 28, 1920, 41 Stat. 456, in addition to Section 15 (3) supra, excludes interurban electric railways in other sections. Section 402, 41 Stat. 478, amending Section 1, which provides for the issuance of certificates of public convenience and necessity in the case of construction, extension or abandonment of a line, excludes by Paragraph 22, 41 Stat. 478, "street, suburban and (or) interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation." Section 439, 41 Stat. 494, which inserts the new Section 20a, concerning the issuance of securities, excludes by Paragraph 1 "a street, suburban or interurban electric railway, which is not operated as a part of a general steam railroad system of transportation." Section 300, 41 Stat. 469, which deals with the Railway Labor Board, created to adjust disputes between carriers and their employees, excludes by Paragraph 1 "a street, interurban, or suburban electric railway not operating as part of a general steam railroad system of transportation." Section 204, 41 Stat. 460, which relates to reimbursement of deficits of carriers during federal control, by paragraph (a) excluded "any street or interurban electric railway which has as its principal source of operating revenue, urban, suburban or interurban traffic or sale of power, heat and light, or both." Section 209, 41 Stat. 464, concerning the guaranty to carriers after the termination of federal control, excludes by paragraph (a) "a street or interurban electric railway not under federal control at the time federal control terminates, which has as its principal source of operating revenue, urban, suburban or interurban passenger traffic, or sale of power, heat and light, or both." Section 422, 41 Stat. 488, which introduced the new Section 15a dealing with the determination of a fair return on property value, excludes in Paragraph (1) (b) "street or suburban electric railways unless operated as part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation, or engaged in the transportation of freight."

in the general transportation of freight is expressly kept within the rate making power given to the Commission by Section 15a, but such a carrier is not mentioned at all in the exception set out in Paragraph 22 of Section 1. Hence the petitioner, bearing in mind that the Piedmont and Northern performs the service of an interurban electric railway and engages in the general transportation of freight, contends that the railroad is within the exception of Paragraph 22 and is at liberty to extend its lines without the Commission's consent. But these considerations do not necessarily lead to the conclusion sought to be reached. It is true that an interurban carrier may be entitled to that descriptive name although it participates in general freight traffic; but it does not follow that every electric carrier, so engaged, is an interurban railroad. Freight traffic may be limited in extent and within the scope of a carrier devoted primarily to local business, and at the same time, be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail and express, and [fol. 296] yet be so restricted in its operations that it may not be properly classified with general steam carriers whose operations cover a wide field. See the discussion in Lackawanna & Wyoming Valley Ry., 105 I. C. C. 178.

The difference in language between the exception in Section 15a and the exception in Section 1, Paragraph 22, may not be ignored, but it is accounted for by the fact that in one case Congress was dealing with rates, and in the other, with the construction of new lines. It evidently concluded that if an electric interurban road should build up a business of transporting property to such an extent as to be engaged in the general transportation of freight, it should be included in the general rate adjustment provided in Section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be engaged in the local carriage of passengers and freight, as its primary business, the extension of its line would remain a matter of local concern and should be left to the regulation of local authority. It is obviously difficult to form an exact defini-

tion of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont and Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn there can be no doubt that a railroad, 92% of whose traffic comes from the general transportation of freight, and 95% of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad.

It is going too far to say that the Piedmont and Northern [fol. 297] is outside the jurisdiction of the Commission over extensions, because literally speaking, it is an interurban electric railway. It is well settled that the literal meaning of the terms of a statute do not necessarily control. The Supreme Court has applied the rule in the interpretation of the term, "carriers" in Omaha Street Railway Company vs. I. C. C., supra, and again in construing the term "industrial track and extensions" in Texas & Pacific Ry. vs. Gulf &c. Ry. supra; and in each instance, has held that the literal significance of the words must give way to the general purpose of the enactment. The decision in Spokane & Inland R. R. Co. vs. U. S., supra, is particularly pertinent in view of the fact that by far the most important activity of the Piedmont and Northern is its general freight business which it carries on precisely like an interstate steam railroad, and that this business has little relation to the local interurban service which it renders. The United States brought suit in that case against the carrier for violation of the Safety Appliance Act, in failing to equip cars with certain appliances required by the statute. The dereliction was admitted; but it was contended that no offense had been committed because the act did not apply to a street railway and the cars of the carrier on their regular route traversed a line of street railway. The court held that the exception in the act did not apply because the cars were also used in regular interstate traffic; for otherwise, the plain purpose of the law would be defeated. A similar

result would follow in the case at bar if the transportation of relatively insignificant interurban business by the Piedmont and Northern should deprive the Commission of power to control the Railway in the greater field of its operations in which it competes with general railroad systems. See also R. R. Comm. vs. Southern Pac. Co., 264 U. S., 331.

The petitioner cites opinions of the Interestate Commerce Commission and the United States Railroad Labor Board in which electric roads, engaged in the transportation of freight, some of them having a much greater mileage than the Piedmont and Northern, have been described [fol. 298] as interurban.** Most of these cases involved applications for through routes, and joint rates with steam roads. The extent to which the electric carrier was engaged in the general transportation of freight was discussed, since electric street railways, not so engaged, are outside the purview of the act. But the Commission was not called upon to draw the line between an interurban and a steam railroad. The decision of the Labor Board, however, was directly in point for the exception of certain interurban

**Chicago & Milwaukee Elec. R. Co. vs. Illinois Cen. R. Co. 13 I. C. C. 20; Cedar Rapids & Iowa C. F. & Light Co. vs. Chicago & N. W. R. Co. 13 I. C. C. 250; Cincinnati & Columbus Traction Co. vs. B. & O. Southwestern R. R. Co., 20 I. C. C. 486; St. Louis, Springfield & Peoria R. R. vs. P. & P. U. Ry. Co., 26 I. C. C. 226; Louisville Board of Trade vs. Indianapolis, Columbus & Southern Traction Co., 27 I. C. C. 499; Jurisdiction over Urban Electric Lines, 33 I. C. C. 536; Chicago, Ottawa and Peoria Ry. Co. vs. Chicago and Northwestern Ry. Co. 33 I. C. C. 573; St. Louis, Mo.-Illinois Passenger Fares, 41 I. C. C. 584; Lourie Mfg. Co. vs. Cincinnati Northern R. R. Co., 42 I. C. C. 448; U. S. Railroad Labor Board, Decision No. 33, December 11, 1920.

The Illinois Traction System is described (21 I. C. C. 226, 41 I. C. C. 584; 42 I. C. C. 448), as an aggregation of railroads which operates about 425 miles of standard guage electric lines in Illinois and owns some 900 cars, of which 775 are freight cars. The system has through routes and joint rates with steam roads to the west, northwest and southwest; in 1915 its gross freight revenues was about $400,000. The decision of the Labor Board refers to "the Pacific Electric Railway Company, operating upward of 600 miles of road; the Fort Dodge, Des Moines and Southern R. R., owning 2,400 box and coal cars, and the Spokane & Inland Empire R. R., crossing State lines and operating passenger and freight trains."

The Memorandum Concerning Electric Railway Companies Reporting to the Interstate Commerce Commission for the Year 1917, issued by the Bureau of Statistics of the Commission May 12, 1919, referred to in United States vs. Village of Hubbard, 266 U. S., 474, 478, note 4, and discussed in the petitioner's brief, gives the mileage operated and the distribution of operating revenues for 267 roads. With the exception of certain railroads devoted to special service, such as terminal and belt line railroads, there were few of any importance in 1917 whose freight revenues formed so large a part of the whole as did those of the Piedmont and Northern. The reports do not show how much of the revenues were derived from interstate or interchange business.

electric railways from its control by Sec. 300 of the Transportation Act is in the same terms as the exception in Para-
[fol. 299] graph 22 of Section 1. The Board held that the Piedmont and Northern and other carriers were excluded from its jurisdiction upon the same grounds as are urged by the petitioner in this case to support its argument.

During the war, the Railroad Administration of the United States was called on to decide what carriers should be taken over by the Government. It was required under the provisions of the Federal Control Act to exclude all interurban electric railways, the major part of whose revenues were drawn from passenger traffic, or the sale of power, heat, and light, or both. The question was solved by rejecting all electric railways whose revenues answered the description in the exception, without regard to the extent of their participation in freight traffic. Certain electric carriers, engaged in the transportation of freight, complained of this classification because it disabled them to raise their intrastate rates in the same manner as was done by other railroads under federal authority. (See Hearings before House Committee on H. R. 4378, (the bill which finally became Transportation Act of 1920), Volume 2, pages 1880, 1947). The Complainants said that although their passenger business exceeded their freight business, nevertheless their locomotives, cars and connections for interchange of business were such that they were able to transport freight in precisely the same manner as steam roads. They contended that it was not proper to classify them as interurban railroads. The adverse decision of the Railroad Administration prior to the passage of the Transportation Act is pertinent to this discussion. But it does not constitute a course of administrative conduct so long continued, and so well settled, that we must shut our eyes to the broad purpose of the Act and assume that the legislative branch of the government in 1920 used the word "interurban" as defined by the executive during the period of the war. New Haven R. R. vs. Interstate Com. Comm. 200 U. S. 361, 401.

The construction placed by the Interstate Commerce Com-
[fol. 300] mission upon the language contained in the exception in Paragraph 22 of Section 1, and in Section 20a of the Act have not been uniform. On October 12, 1920, the

Commission ruled that it did not have jurisdiction over the Piedmont and Northern in regard to the issuance of securities because the road was covered by the exception in Section 20a. This ruling, however, was ex parte and no opinion seems to have been filed. The application of Michigan United States Railways Company, 67 I. C. C. 452, for a certificate of public convenience and necessity, was considered on April 21, 1921. The railroad serves cities in Michigan and adjacent territory and has a physical connection for interchange of business with the Pere Marquette Railway. The Commission's memorandum of 1917 shows that it is 404.16 miles in length and that its passenger revenues were $3,402,002.27, and freight revenues, $392,633.58 in that year. It was decided that the railroad was covered by the exception in Paragraph 22 of Section 1 of the Act.

On the other hand, the Commission decided in 1922 that it had jurisdiction under Section 20a over the Sacramento Northern Ry. 71 I. C. C. 653, and 79 I. C. C.782. This company owned and operated an electric railway extending 165 miles northerly from Sacramento, which was equipped with locomotives capable of hauling from 40 to 50 loaded freight cars. The most important part of its business was through passenger and freight traffic, originating on its lines and delivered to steam trunk lines for interstate transportation. The Commission, answering the contention that the road was excluded from its authority as an interurban railroad, said:

"We are by no means convinced, however, that the Northern is an interurban electric railway, as that term is used in the Statute. Much of the transportation service rendered by it, no doubt, is similar to that rendered by electric interurban railways. The service of such railways, however, is distinguished by its local and limited character and [fol. 301] by the fact that the bulk of their revenues are derived from the transportation of passengers.** Their

**The statement that the service of an interurban railroad is distinguished by its local and limited character is not disputed. It is borne out by the opinions of the Commission, of the Labor Board, and by statements and testimony offered to the Congressional Committee when the Transportation Act of 1920 was under consideration. See the statement of the American Electric Railway Association, and of the National Association of Railroad and Utilities Commissoners, in Hearings before House Committee on Interstate and Foreign Commerce, H. R. 4378, Volume 3, page 2418; Volume 2, pages 1611-1613-1629.

facilities for handling freight are usually inadequate or lacking so as to disable them from engaging in its general transportation. The amount of business interchanged by them with connecting carriers is ordinarily very small. Congress obviously did not intend to exclude all electric railways from the operation of Section 20a. If the Western Pacific were to completely electrify its system, it would not thereby become a street, suburban, or interurban electric railway. Some of its operations might partake of the nature of street, suburban or interurban railway service, but its business as a whole would be of a far broader character. Similarly it appears from the facts of record that the Sacramento Northern is more than an interurban carrier as that term is generally understood."

See also Ex Parte 38, 122 I. C. C. 414.

It is our conclusion that the more recent rulings of the Commission conform to the purpose of the statute and point the way to the correct classification of the Piedmont and Northern. Its freight traffic dominates so completely the field of its operations, and reaches so far, through interchange with other railroads, that it is outside the class which Congress intended to exclude from the control of the Commission. Even if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so similar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent.

The petition must therefore be dismissed.

[fol. 302] In United States District Court

In Equity. No. 208

Piedmont and Northern Railway Company, Petitioner,

v.

United States of America, Defendant

Before the Honorable Edmund Waddill, Jr., and the Honorable Elliot Northcott, United States Circuit Judges, and

the Honorable Morris A. Soper, United States District Judge, Holding the Specially Constituted District Court Pursuant to Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219)

FINAL DECREE—Filed Feb. 6, 1929

This case was submitted for final decree upon the evidence of record before the Interstate Commerce Commission and argument of counsel. Upon consideration thereof, and the Court being fully advised, it is, for the reasons stated in its opinion filed herein on January 15, 1929, considered and decreed that the relief prayed by petitioner be, and the same is hereby denied, and the petition dismissed.

This 1st day of February, 1929.

(Signed) Edmund Waddill, United States Circuit Judge. (Signed) Elliot Northcott, United States Circuit Judge. (Signed) Morris A. Soper, United States District Judge.

[fol. 302½] [File endorsement omitted.]

[fol. 303] Copy

IN UNITED STATES DISTRICT COURT

[Title omitted]

DOCKET ENTRIES

May	22,	1928.	Filing Bill in Equity—Copy for the Judge.
May	22,	"	" 2 Copies for Service—mailed to Washington, D. C.
May	22,	"	Filing 1 Copy for Service on U. S. Attorney.
May	29,	"	Filing and Entering Acceptance of Service by U. S. A.
June	5,	"	Filing and Entering Returns of U. S. M. on service.
June	5,	"	Filing Bill of U. S. M.

June 6, 1928. Filing Intervention Petition of Southern Railway Company, et al, and entering Order (M. P.).

June 6, " Certified copy of Petition & Order to Attorney General.

June 6, " Filing Certificate of Clerk as to mailing of Certified Copy of Intervention Petition and Order to the Attorney General, Washington, D. C.

June 7, " Filing Certificate of Disqualification & Order (M. B. 17636) 1 Copy—M. B. 17636.

June 6, " Issuing 3 Certified Copies of Intervention Petition of Southern Railway Co. et al., and Order thereon,—15 Fo. @ 5¢—2 Fo. @ 15¢ & Seal. 1 to U. S. Atty. Greenville, S. C. 1 to Interstate Commerce Com. 1 to the Judge under Rule 7.

June 14, " [fol. 304] Filing Intervention of Interstate Commerce Commission—Copy for Judge.

June 14, " Filing Motion to Dismiss and Answer of Interstate Commerce Commission.

June 13, " Filing and Entering Order Designating Hon. M. A. Soper. (M. P. 17655.)

June 21, " Filing Answer of U. S.—Copy for the Judge.

June 18, " Filing Points and authorities of W. S. O'B.—Robinson on question whether one or three Judges should be appointed for hearing—5 copies.

June 29, " On hearing before M. A. Soper, several Orders allowed—Edmund Waddill, Jr., and Elliott Northcott designated as the two additional Judges.

June 28, " Filing and Entering Order permitting Interstate Commerce Commission to intervene—(M. P. 17704).

June 29, " Filing and Entering Order permitting Southern Railway Company, et al., to intervene, (M. P. 17704).

June 29, " Filing and Entering Order Fixing time and place for the Hearing, (M. P. 17706).

June 29, " Filing and Entering Order Directing the Filing of Briefs, etc. (M. P. 17706).

July 7, 1928. One Certified Copy of Judge Soper's Order of 6/28/28 to H. & H. 3 fo. 1 to F. B. G.

July 7, " One Certified Copy of Order permitting Southern Railway Company to Intervene to H. & H. 5 fo. 1 to F. B. G.

July 7, " One Certified Copy of Order Fixing time and place for Hearing to H. & H. 3 fo. 1 to F. B. G.

July 7, " One Certified Copy of Order Directing Filing of Briefs to H. & H. 4 fo. 1 to F. B. G.

July 7, " One Certified Copy of each of the above Four Orders to W. S. O'B. Robinson.

July 7, " One Certified Copy of each of the above Four Orders to B. Esterline.

July 7, " One Certified Copy of each of the above Four Orders to D. W. Knowlton.

July 7, " One Certified Copy of each of the above Four Orders to S. R. Prince, Southern Railway.

July 14, " One Certified Copy of each of the above Four Orders to J. F. Wright for S. A. L. Ry.

July 14, " One Certified Copy of each of the above Four Orders to C. H. Davis, A. C. L. Ry.

[fol. 305]

July 24, 1928. One Certified Copy of each of the above Four Orders to J. J. McLaughlin, Clinchfield Ry.

July 18, " Filing Answer Intervening Defendant Railways.

July 28, " Filing Four copies to Judges—two to Plaintiff's Attorneys.

Aug. 10, " Filing printed copy of "Petitioner's Statement reducing to Narrative form so much of the evidence taken before the Interstate Commerce Commission as is relevant to the Issues involved in this suit"—together with Exhibits Nos. 1-2-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-20-22-23-24-25-26-27-28-34-46-47-52-53-63-115-136.

Aug. 10, " Filing Three Copies of above Petitioner's Statement, together with three (3) sets of above Exhibits for the three Judges named to hear this matter.

Aug. 10, 1928. Copy of above for Judge Watkins and Copy for Files.

Sept. 12, " Filing Petition of National Association of R. R. and Utilities Commission for leave to intervene. 3 Copies of Petition for Judges.

Sept. 12, " Ten Copies of Petition for Attorneys.

Sept. 12, " Making indorsement on Cover of Four Copies.

Sept. 18, " Filing Petitioner's Brief.

Sept. 18, " Filing Petitioner's Supplemental Brief.

Sept. 18, " Filing Four Copies of Brief and Supplemental Brief for Judges.

Sept. 19, " Filing Narrative by Intervening Railways, etc. 5 Copies for Judges, etc.

Sept. 19, " Filing Brief for the U. S. 4 Copies for the Judges, etc.—5 Copies for Plaintiffs.

Sept. 19, " Filing Brief on behalf of Intervening Defendant Steam Railroads. 3 Copies for Judges—2 additional Copies for Judge Watkins.

Sept. 19, "

" 19, " Filing Brief for Interstate Commerce Commission. 3 Copies for the Judges, 1 for Judge Watkins, 1 extra.

Sept. 22, " Twelve additional Copies of Petition of National Association of R. R. etc.

Sept. 27, " Filing Brief for the U. S. 4 copies for Judge, 5 extra copies.

[fol. 306]

Oct. 1, 1928. Filing Petitioner's Reply Brief, etc. 4 Copies for Judges, 25 extra Copies.

Oct. 2, " Filing Petitioner's Reply Brief. 5 Copies for Judges, 10 extra Copies.

Oct. 2, " Filing Exhibit "A" at Asheville, filed by W. S. O'B. Robinson, being certified copy of Records and proceedings before I. C. C. at Charlotte, N. C. in June 1927. I. C. C. Docket # Finance 6208.

Oct. 2, " Filing Exhibit "B" at Asheville, N. C., being return to Question-aire of April 18, 1927 and supplemental return to Question-aire of May 13, 1927, I. C. C. Docket # Finance 6208.

Oct. 2, 1928. Filing Exhibit "C" at Asheville, N. C., being letter of March 8, 1927 from I. C. C. signed by B. H. Meyer, Commissioner to W. S. Lee.

Oct. 2, " Filing and entering Order allowing National Association of Railroad and Utilities Commissioners to intervene as a Petitioner,—4 copies for Judges.

Oct. 2, " Filing Brief of National Association of Railroad and Utilities Commissioners, in support of applicant's motion to Dismiss,—4 copies for Judges,—4 extra copies.

At hearing in Asheville, case argued before Judges Waddill, Jr., Soper and Northcott, lasting from October 2 to 4, inc., the above Orders, Exhibits, etc., were filed (M. P. [fol. 307] 18011).

Jan. 15, 1929. Filing and Entering Opinion—Petition to be Dismissed—Copy for Judge—M. P. 35).

Jan. 18, 1929. Certified Copy of Opinion to Robinson; Blythe & Bonham—Ch. M/E.

Feb. 6, 1929. Filing and Entering Final Decree—Petitioner's Prayer Denied and Petition Dismissed (M. P. 206).

Feb. 7, 1929. Certified Copy of Decree to: H. & H.; B. & B.; and J. E. Benton, and W. S. O'B. Robinson, Jr.

Feb. 7, 1929. Copy of Decree to Judge Watkins

March 15, 1929. Filing and Entering Notice of Appeal with Acceptance of Service by Atty. Gen. of N. C. (M. P. 557).

March 25, 1929. Filing and Entering Notice of Appeal with Acceptance of Service by Atty. Gen. of S. C. (M. P. 557).

March 22, 1929. Filing and Entering Citation with Acceptance of Service by Solicitor S. A. L. Ry. Co. on 3/18/29—M. P. 554.

March 13, 1929. Filing & Ent. Petition for Appeal (M. P. 546).

March 13, 1929. Filing & Ent. Assignment of Errors (M. P. 546).

March 13, 1929. Filing & Ent. Order Allowing Appeal of P. & N. Ry. and Nat'l Asso. of R. R. and Util. Commrs. (M. P. 549).

March 13, 1929. Filing & Ent. Bond on Appeal & Judge Soper's Indorsement of Approval (M. P. 550).

March 13, 1929. Filing & Ent. Citation with Acceptance of Service by I. C. C. (M. P. 554).

March 13, 1929. Filing & Ent. Citation with Acceptance of Service by Sou. Ry. M. P. 554.

March 13, 1929. Filing & Ent. Citation with Acceptance of Service by Spl. Asst. to Atty. Gen. U. S. M. P. 554.

March 13, 1929. Filing & Ent. Citation with Acceptance of Service by A. C. L. Ry. M. P. 554

March 13, 1929. Filing & Ent. Citation with Acceptance of Service by C. & W. C. Ry. (M. P. 554).

March 13, 1929. Filing & Acceptance of Citation of Service by L. & N. Ry. 3/14/29 (M. P. 554).

March 19, 1929. Filing & Acceptance of Citation 3/14/29 by the three Clinchfield R. R. (M. P. 554).

March 19, 1929. Filing Acceptance of Service by L. & N. Ry. of Assignment of Errors, etc.

March 19, 1929. Flg. Acceptance of Service by U. S. A. of Assignment of Errors, etc.

March 19, 1929. Flg. Acceptance of Service by I. C. C. of Assignment of Errors, etc.

March 19, 1929. Flg. Acceptance of Service by Sou. Ry. of Assignment of Errors, etc.

March 19, 1929. Flg. Acceptance of Service by Sou. Ry. of Assignment of Errors, etc.

March 19, 1929. Flg. Acceptance of Service by A. C. L. Ry.
[fol. 308] of Assignment of Errors, etc.

March 19, 1929. Flg. Acceptance of Service by C. & W. C. Ry. of Assignment of Errors, etc.

March 19, 1929. Flg. Acceptance of Service by S. A. L. Ry. of Assignment of Errors, etc.

March 19, 1929. Flg. Acceptance of Service by C. C. & O. Ry. of Assignment of Errors, etc.

March 19, 1929. Flg. Acceptance of Service by C. C. & O. of S. C. of Assignment of Errors, etc.
March 19, 1929. Flg. Acceptance of Service by C. C. & O. of Ky. of Assignment of Errors, etc.
March 16, 1929. 12 Certified Copies of Order Allowing Appeal sent to Attys. see letter of 3/16/29.
April 11, 1929. Flg. and Entg. Order Extending Time (M. P. 708). Original forwarded to Supreme Court Clerk.
April 11, 1929. Certified Copy of above Order for office record.
May 24, 1929. Filing and Entering Statement of Evidence (M. P. 931).
May 29, 1919. Filing Præcipe for Transcript of Record.

[fol. 309] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Piedmont and Northern Railway Company, Petitioner, and National Association of Railroad and Utilities Commissioners, Intervening Petitioner, now come by their respective counsel and, in connection with their petition for appeal file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final decree of the District Court entered February 6, 1929.

The District Court erred:

I. In holding that Petitioner, Piedmont and Northern Railway Company, had not undertaken the construction of the proposed lines of railway described in the petition, prior to the effective date of Paragraphs (18) to (21), both inclusive, of section 1 of the "Interstate Commerce Act," as amended by the "Transportation Act, 1920."

II. In not holding that petitioner, Piedmont and Northern Railway Company, had undertaken the construction of the proposed lines of railway described in the petition, prior to the effecrive date of Paragraphs (18) to (21), both inclu-

sive, of section 1 of the "Interstate Commerce Act" as amended by the "Transportation Act, 1920," and that it has never abandoned the undertaking to construct said lines.

III. In holding that the railway of petitioner is not an interurban electric railway, which is not operated as a part [fol. 310] of a general steam railroad system of transportation.

IV. In not holding that Paragraph (22) of Section 1 of the "Interstate Commerce Act" restricts the authority of the Interstate Commerce Commission conferred by Paragraphs (18) to (21), both inclusive, of said section of said Act so that said authority does not extend to the construction by petitioner of the proposed lines of railway described in its petition.

V. In entering the following decree:

"That the relief prayed by petitioner be, and the same hereby is denied, and the petition dismissed."

Wherefore the above named petitioner and intervening petitioner, petitioners herein, and each of them, pray that the decree of said District Court entered February 6, 1929, denying the relief prayed by petitioner, Piedmont and Northern Railway Company, and dismissing its petition, be reversed and set aside, with directions that a decree be entered that the order of the Interstate Commerce Commission of April 3, 1928, taking jurisdiction of the application of petitioner, Piedmont and Northern Railway Company, made a part of its original petition filed in the District Court and attached thereto as Exhibit "A," and denying to petitioner the right, privilege and authority to construct the proposed lines of railway described in said application, without first obtaining from the Commission a certificate of public convenience and necessity authorizing the construction of said lines, be set aside and annulled, and for such other and further relief as may be appropriate.

Charles E. Hughes, Cameron Morrison, H. J. Haynsworth, W. S. O'B. Robinson, Jr., Attorneys for Piedmont and Northern Railway Company. John E. Benton, General Solicitor for National Association of Railroad and Utilities Commissioners.

[fol. 311] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the Piedmont and Northern Railway Company and National Association of Railroad and Utilities Commissioners, and include therein, in the order given below, the following matter, viz:

1. Petition and Exhibits attached thereto.
2. Certificate of disqualification of Honorable H. H. Watkins, United States District Judge.
3. Designation of Honorable Morris A. Soper, United States District Judge for the District of Maryland, to act in place of Honorable H. H. Watkins.
4. Intervention and answer of Southern Railway Company, Seaboard Air Line Railway Company, Charleston & Western Carolina Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Carolina, Clinchfield & Ohio Railway, Carolina Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky.
5. Intervention, motion to dismiss and answer of Interstate Commerce Commission.
6. Answer of United States.
7. Intervention and petition of the National Association of Railroad and Utilities Commissioners.
8. Statement of evidence, with stipulation of parties agreeing upon same, and approval thereof by the court.
9. Opinion of the District Court.

[fol. 312] 10. Final decree of the District Court.

11. All journal entries in their appropriate order.
12. Petition for appeal.
13. Assignment of errors.
14. Order allowing appeal.
15. Præcipe for record, with stipulation of parties agreeing upon same.
16. Notice to Attorney General of North Carolina.
17. Notice to Attorney General of South Carolina.

18. Citations to defendants and intervening defendants with acceptances of service.

This 20th day of May, A. D. 1929.

W. S. O'B. Robinson, Jr., Attorney for Piedmont and Northern Railway Company. John E. Benton, General Solicitor for National Association of Railroad and Utilities Commissioners.

Service of the foregoing præcipe for record, and the receipt of a copy thereof, are hereby admitted and acknowledged, and it is agreed that the matters specified therein shall constitute the record on appeal, the right to designate additional portions of the record to be incorporated into the transcript being hereby waived.

This 25th day of May, A. D. 1929.

United States of America, Defendant, by Elmer B. Collins, Special Assistant to the Attorney General. Interstate Commerce Commission, Intervening Defendant, by Daniel W. Knowlton, Chief Counsel. Southern Railway Company, Intervening Defendant, by L. E. Jeffries, Attorney. Seaboard Air Line Railway Company, Intervening Defendant, by James F. Wright, Attorney. [fol. 313] Charleston & Western Carolina Railway Company, Intervening Defendant, by Carl H. Davis, Attorney. Atlantic Coast Line Railroad Company, Intervening Defendant, by Carl H. Davis, Attorney. Louisville & Nashville Railroad Company, Intervening Defendant, by William C. Burger, Attorney. Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, Intervening Defendants, by James J. McLaughlin, Attorney.

[fol. 314] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

It appearing that the record is voluminous and that additional time is required to assemble, prepare and certify

the transcript thereof on appeal, and for other good cause shown:

It is ordered that the time within which Piedmont and Northern Railway Company and National Association of Railroad and Utilities Commissioners (petitioner and intervening petitioner respectively in the District Court, and appellants in the Supreme Court of the United States), shall docket the case and file the record thereof with the Clerk of the Supreme Court, be, and it is hereby enlarged to and including Monday, June 17th, 1929.

Morris A. Soper, United States District Judge.

[fol. 315] In United States District Court

Memorandum

(1) Petition for appeal filed March 13, 1929.

(2) Order allowing appeal filed March 13, 1929.

(3) Bond on Appeal:—dated February 25, 1929.

Penalty: $1,000.00.

Obligors: Piedmont and Northern Railway Company, a Corporation duly organized and existing under the laws of the State of South Carolina, and National Association of Railroad and Utilities Commissioners (an unincorporated voluntary association), as Principals, and Fidelity and Deposit Company of Maryland, as Surety.

Conditioned for: Damages and costs.

(4) Notice of Appeal to the Attorney General of South Carolina, with Acceptance of Service thereon.

(5) Notice of Appeal to the Attorney General of North Carolina, with Acceptance of Service thereon.

(6) 8 citations dated March 11, 1929 with Acceptances of Service thereon.

[fol. 316] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 317] In United States District Court

[Title omitted]

Petition for Appeal—Filed Mar. 13, 1929

Piedmont and Northern Railway Company, Petitioner, and National Association of Railroad and Utilities Com-

missioners, Intervening Petitioner, feeling themselves aggrieved by the final decree of the District Court filed and entered on the 6th day of February, A. D. 1929, hereby pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they considered the final decree erroneous are set forth in the assignment of errors on file, to which reference is made.

They pray that a transcript of the record, proceedings and papers on which the final decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

Charles E. Hughes, Cameron Morrison, H. J. Haynsworth, W. S. O'B. Robinson, Jr., Attorneys for Piedmont and Northern Railway Company. John E. Benton, Gen. Solicitor for National Asso. of Railroad and Util. Com.

[fol. 317½] [File endorsement omitted.]

[fol. 318] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Mar. 13, 1929

Piedmont and Northern Railway Company, Petitioner, and National Association of Railroad and Utilities Commissioners, Intervening Petitioner, now come by their respective counsel and, in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final decree of the District Court entered February 6, 1929.

The District Court erred:

I. In holding that Petitioner, Piedmont and Northern Railway Company, had not undertaken the construction of the proposed lines of railway described in the petition, prior to the effective date of Paragraphs (18) to (21), both

inclusive, of Section I of the "Interstate Commerce Act" as amended by the "Transportation Act, 1920."

II. In not holding that petitioner, Piedmont and Northern Railway Company, had undertaken the construction of the proposed lines of railway described in the petition, [fol. 319] prior to the effective date of Paragraphs (18) to (21), both inclusive, of Section I of the "Interstate Commerce Act" as amended by the "Transportation Act, 1920," and that it has never abandoned the undertaking to construct said line.

III. In holding that the railway of petitioner is not an interurban electric railway, which is not operated as a part of a general steam railroad system of transportation.

IV. In not holding that Paragraph (22) of Section I of the "Interstate Commerce Act" restricts the authority of the Interstate Commerce Commission conferred by Paragraphs (18) to (21), both inclusive, of said section of said Act so that said authority does not extend to the construction by petitioner of the proposed lines of railway described in its petition.

V. In entering the following decree:

"That the relief prayed by petitioner be, and the same hereby is denied, and the petition dismissed."

Wherefore the above named petitioner and intervening petitioner, petitioners herein, and each of them, pray that the decree of said District Court entered February 6, 1929, denying the relief prayed by petitioner, Piedmont and Northern Railway Company, and dismissing its petition, be reversed and set aside, with directions that a decree be entered that the order of the Interstate Commerce Commission of April 3, 1928, taking jurisdiction of the application of petitioner, Piedmont and Northern Railway Company, made a part of its original petition filed in the District Court and attached thereto as Exhibit "A," and denying to petitioner the right, privilege and authority to construct the proposed lines of railway described in said application, without first obtaining from the Commission a certificate of public convenience and necessity authorizing [fol. 320] the construction of said lines, be set aside and

annulled, and for such other and further relief as may be appropriate.

Charles E. Hughes, Cameron Morrison, H. J. Haynsworth, W. S. O'B. Robinson, Jr., Attorneys for Piedmont and Northern Railway Company. John E. Benton, General Solicitor for National Association of Railroad and Utilities Commissioners.

[fol. 320½] [File endorsement omitted.]

[fol. 321] In United States District Court

[Title omitted]

Order Allowing Appeal of Piedmont and Northern Railway Company and National Association of Railroad and Utilities Commissioners—Filed Mar. 13, 1929

In the above entitled cause Piedmont and Northern Railway Company, Petitioner, and National Association of Railroad and Utilities Commissioners, Intervening Petitioner, having made and filed their petition praying an appeal to the Supreme Court of the United States from a final decree of the District Court made and entered February 6, 1929, and having also made and filed assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided;

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed, and made returnable within thirty (30) days from the date hereof, and the Clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers, on which the said decree was made and entered, to the Supreme [fol. 322] Court of the United States.

Morris A. Soper, United States District Judge.

[fol. 322½] [File endorsement omitted.]

[fols. 323-326½] Bond on Appeal for $1,000, approved and filed Mar. 13, 1929, omitted in printing.

[fol. 327] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed Mar. 15, 1929

To the Honorable Dennis G. Brummit, Attorney General of the State of North Carolina:

You are hereby notified that the Piedmont and Northern Railway Company, Petitioner, and National Association of Railroad and Utilities Commissioners, Intervening Petitioner, have taken an appeal from the final decree of the District Court entered February 6, 1929, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to Urgent Deficiencies Act, October 22, 1913 (38 Stat. 221).

Charles E. Hughes, Cameron Morrison, H. J. Haynsworth, W. S. O'B. Robinson, Jr., Attorneys for Piedmont and Northern Railway Company. John F. Benton, General Solicitor for National Association of Railroad and Utilities Commissioners.

[fol. 328] Service of the foregoing Notice of Appeal is hereby admitted, and the receipt of a copy thereof acknowledged, this 13 day of March, 1929.

Dennis G. Brummitt, Attorney General of the State of North Carolina.

[fol. 328½] [File endorsement omitted.]

[fol. 329] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed Mar. 25, 1929

To the Honorable John M. Daniel, Attorney General of the State of South Carolina:

You are hereby notified that the Piedmont and Northern Railway Company, Petitioner, and National Association

of Railroad and Utilities Commissioners, Intervening Petitioner, have taken an appeal from the final decree of the District Court entered February 6, 1929, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to Urgent Deficiencies Act, October 22, 1913 (38 Stat. 221).

Charles E. Hughes, Cameron Morrison, H. J. Haynsworth, W. S. O'B. Robinson, Jr., Attorneys for Piedmont and Northern Railway Company. John E. Benton, General Solicitor for National Association of Railroad and Utilities Commissioners.

[fol. 330] Service of the foregoing Notice of Appeal is hereby admitted, and the receipt of a copy thereof acknowledged, this 18th day of March, 1929.

John M. Daniel, Attorney General of the State of South Carolina.

[fol. 330½] [File endorsement omitted.]

[fols. 331-354½] Citations, in usual form, showing service on Daniel W. Knowlton, L. E. Jeffries, et al., omitted in printing.

[fols. 355 & 355a] In United States District Court

[Title omitted]

Order Extending Time—Filed Mar. 11, 1929

It appearing that the record is voluminous and that additional time is required to assemble, prepare and certify the transcript thereof on appeal, and for other good cause shown;

It is ordered that the time within which Piedmont and Northern Railway Company and National Association of Railroad and Utilities Commissioners (petitioner and intervening petitioner respectively in the District Court, and appellants in the Supreme Court of the United States),

shall docket the case and file the record thereof with the Clerk of the Supreme Court, be, and it is hereby enlarged to and including Monday, April 15th, 1929.

Morris A. Soper, United States District Judge.

[fol. 355b] [File endorsement omitted.]

[fols. 356 & 356a] In United States District Court

[Title omitted]

Order Extending Time—Filed April 12, 1929

It appearing that the record is voluminous and that additional time is required to assemble, prepare and certify the transcript thereof on appeal, and for other good cause shown;

It is ordered that the time within which Piedmont and Northern Railway Company and National Association of Railroad and Utilities Commissioners (petitioner and intervening petitioner respectively in the District Court, and appellants in the Supreme Court of the United States), shall docket the case and file the record thereof with the Clerk of the Supreme Court, be, and it is hereby enlarged to and including Monday, June 17th, 1929.

Morris A. Soper, United States District Judge.

[fol. 356b] [File endorsement omitted.]

[fol. 357] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed June 25, 1929

Come now the appellants in the above entitled cause and state that the points upon which they intend to rely in this Court in this cause are as follows:

Point 1. That the District Court of the United States for the Western District of South Carolina erred in dis-

missing the appellant, Piedmont and Northern Railway Company's petition, and in refusing to enjoin, set aside, and annul the order of the Interstate Commerce Commission as unauthorized for the following reasons:

(a) The lines of railway which the appellant Piedmont and Northern Railway Company proposed to construct were to be a part of an interurban electric railway, not operated as a part of a general steam system of transportation, within the meaning of paragraph (22) of Section 1 [fol. 358] of the Interstate Commerce Act as amended by the Transportation Act, 1920; that all the evidence before the Interstate Commerce Commission so showed and that there was no evidence to the contrary.

(b) The construction of the proposed lines of interurban electric railway was undertaken before the Transportation Act, 1920 went into effect, within the meaning of paragraph (18) of Section 1 thereof; that all the evidence before the Interstate Commerce Commission so showed and that there was no evidence to the contrary.

(c) The facts as found by the Commission and as set out in the Commission's report, which is made a part of its order dated April 3, 1928 are not sufficient in law to justify and sustain said order.

Parts of the Record to be Printed

The appellants, and each of them, hereby designate for printing the entire record, which they think necessary for the consideration of the foregoing appeal and the points on which they intend to rely, except so much and such parts of the record as are designated below, which shall not be printed, to-wit:

1. Certificate of disqualification of Honorable H. H. Watkins, United States District Judge.

2. Designation of Honorable Morris A. Soper, United States District Judge of the District of Maryland, to act in place of Honorable H. H. Watkins.

3. The three maps attached to and made a part of the statement of the evidence, which maps are marked Exhibits Nos. 1, 70 and 73. Ten copies of each of said maps

[fol. 359] will be furnished in due time for use on the hearing.

This 24th day of June, A. D. 1929.

Piedmont and Northern Railway Company, by Charles E. Hughes, Cameron Morrison, H. J. Haynsworth, W. S. O'B. Robinson, Jr., Its Duly Authorized Attorneys. National Association of Railroad and Utilities Commissioners, by John E. Benton, Its General Solicitor Thereunto Duly Authorized.

[fol. 360] STATE OF NORTH CAROLINA,
County of Mecklenburg:

W. S. O'B. Robinson, Jr., being first duly sworn on oath, deposes and says that he is one of the Attorneys for the appellants in the above entitled cause, and that he has this day served the foregoing statement upon the adverse parties by sending a copy thereof by United States registered mail, duly addressed to each of the following, to-wit: Mr. Elmer B. Collins, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.; Mr. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Washington, D. C.; Mr. L. E. Jeffries, General Counsel, Southern Railway Company, Washington D. C.; Mr. James F. Wright, General Solicitor, Seaboard Air Line Railway Company, Norfolk, Virginia; Mr. Carl H. Davis, Attorney, Charleston & Western Carolina Railway Company, Wilmington, N. C.; Mr. Carl H. Davis, General Attorney, Atlantic Coast Line Railroad Company, Wilmington, N. C.; Mr. William C. Burger, Commerce Attorney, Louisville & Nashville Railroad Company, Louisville, Ky.; Mr. Jas. J. McLaughlin, General Solicitor, Carolina, Clinchfield & Ohio Railway, Carolina Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky, Erwin, Tennessee.

W. S. O'B. Robinson, Jr.

Sworn to and subscribed before me this the 24th day of June, A. D. 1929. Jas. S. Sease, Notary Public, Mecklenburg County, N. C. My commission expires June 18, 1931. (Seal of Jas. S. Sease, Notary Public, Mecklenburg Co., N. C.)

[fol. 361] [File endorsement omitted.]

Endorsed on cover: File No. 34,295. W. South Carolina D. C. U. S. Term No. 164. Piedmont and Northern Railway Company and National Association of Railroad and Utilities Commissioners, appellants, vs. United States of America, Interstate Commerce Commission and Southern Railway Company, et al. Filed June 13, 1929. File No. 34,295.

FILE COPY

FILE
JUL. 3 1
CHARLES ELMORE

No. 164

In the Supreme Court of the United States

OCTOBER TERM, 1929

PIEDMONT AND NORTHERN RAILWAY COMPANY, AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, *et al*

Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

Jurisdictional Statement for Appellants Under Rule 12

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 164

PIEDMONT AND NORTHERN RAILWAY COMPANY, AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, *et al*

Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

Jurisdictional Statement for Appellants Under Rule 12

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

A. THE STATUTORY PROVISIONS SUSTAINING JURISDICTION

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 938 (U. S. C. Tit. 28, Sec. 345), provides as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * *
>
> (4). So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

The Urgent Deficiencies Act of October 22, 1913, Ch. 32, 38 Stat. 208, 219-220 (U. S. C. Tit. 28, Sec. 41 (28), 47 and 47-a) confers jurisdiction upon the District Court of suits brought to enjoin, set aside, annul, or suspend "in whole or in part any order of the Interstate Commerce Commission," and, with respect to review by the Supreme Court of decrees entered in such suits, provides as follows:

"A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

B. DATE OF DECREE, AND DATE OF APPLICATION FOR APPEAL

The final decree sought to be reviewed was entered on February 6, 1929 (R. 302).[1]

The application for appeal was presented on March 11, 1929, and the order allowing the appeal was entered on March 13, 1929 (R. 315).

C. NATURE OF THE CASE AND RULINGS BELOW

The appellant, Piedmont and Northern Railway Company, upon notice from the Interstate Commerce Commission,[2] filed an application with the Commission for a certificate of Public Convenience and Necessity for the construction of certain lines of its electric railway. In its application,

---

[1]References are made to pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court, as the record has not yet been printed.

[2]"You are, therefore, advised that before the Piedmont and Northern constructs any extensions to its line or issues any securities it will be expected to file appropriate applications for authority therefor under Sections 1 and 20-a. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention" (R. 162).

appellant reserved the right to assert that the Commission was without authority in the matter, but asked that, if the Commission should hold otherwise, the certificate should be granted (R. 24, 26).

Paragraphs 18 and 22 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, Ch. 91, 41 Stat. 456, 474, 477, 478 (U. S. C. Titl. 49, Sec. 1, 18-22), provide respectively as follows:

> "18. After ninety days after this paragraph takes effect, no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or the extension thereof, * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation or construction and operation, of such additional or extended line of railroad, * * * "

> "22. The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of a street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Appellant asserted before the Commission that no certificate was required or authorized under paragraph 18 of Section 1 of the Act for the following reasons:

(1) The appellant and the lines sought to be completed were "interurban electric railway * * * not operated as a part * * * of a general steam railroad system of transportation," within the meaning of paragraph 22, and were therefore excluded from the operation of paragraph 18; the proposed lines were to be used to render that type of local service peculiar to interurban electric railways. (See *United States* v. *Village of Hubbard*, 266 U. S., 474, 480;

(2) The lines to be completed were essential parts of an entire unitary project, the construction of which was begun in a substantial way and in good faith prior to the enactment of paragraph 18; thus the case was one of completion of existing lines and not of their extension; the completion of the project was never abandoned, but was prosecuted with due diligence under all the circumstances (See *Detroit Terminal Ry. Co.* v. *Penn-Detroit Ry. Co.*, 15 F. (2d) 507 (C. C. A. 6th). These questions with respect to the Commission's authority were duly reserved throughout the proceedings (R. 24, 41, 46).

The Commission, however, entered an order (R. 107) assuming authority and denying the application for a certificate of Public Convenience and Necessity. (*Proposed construction of lines by Pied-*

mont and Northern Railway Company, Finance Docket No. 6208, 138 I. C. C. 363).

Thereafter, appellant brought this suit under the Urgent Deficiencies Act (Ch. 32, 38 Stat. 220; U. S. C. Tit. 28, Secs. 41 (28) and 47, 47-a) to enjoin, set aside and annul that part of the above mentioned order of the Commission assuming authority over appellant under paragraph 18. A statutory court of three judges was accordingly organized. Appellant again asserted the grounds for its contention that the Commission was without authority, i.e., (1) that it was an interurban electric railway, and (2) that construction was begun before the effective date of the Act (R. 8). The court, however, rejected both grounds and sustained the authority of the Commission. A final decree was entered dismissing appellant's petition (R. 302). (Opinion reported *Piedmont and Northern Ry. Co.* v. *United States*, 30 F. (2d) 421). This appeal was taken from that final decree (R. 315).

D. CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THIS APPEAL

(1) No complaint is here made with respect to that part of the order merely refusing a certificate of Public Convenience and Necessity. A review of that portion of the order would involve but an exercise by the court of the administrative function of granting a request which the Commission denied. (See *Chicago Junction* case, 264 U. S. 258, 264).

But the challenge is directed to that part of the order affirmatively declaring the status of appellant as a carrier within the operation of paragraph 18 of Section 1 of the Act. This part of the order was not the result of an administrative function of the Commission, nor was it requested by the appellant. On the contrary, it was a judicial determination of the scope of the statutory authority of the Commission, the occasion for which was brought about solely at the instance of the Commission itself, and over the objection of the appellant (R. 162). The question whether, upon the facts established, the Commission exceeded its authority under paragraph 18, and thereby deprived appellant of the immunities expressly conferred by paragraph 22 upon interurban electric railway, is purely a question of law and clearly subject to judicial review.

As this Court said, in the *Intermountain Rate Cases* (234 U. S. 476, at 490) in response to a contention that an order was "purely negative" and not subject to "judicial inquiry."

> " * * * the proposition disregards the fact that the right to petition the commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative since it refuses *that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist.* It is of course true * * * that findings of fact made by the commission within the

scope of its administrative duties must be accepted * * * but that doctrine * * * does not relieve the courts in a proper case from determining whether * * * statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given * * *" (italics ours).

Accordingly, in the *Tap Line Cases* (234 U. S. 1, 10, 22) an order declaring tap lines to be "plant facilities", not "railroads", and denying their application for division of rates was held judicially reviewable. And in *United States* v. *American Ry. Express Co.*, 265 U. S. 425, an order declaring the status of an express company to be other than that of a "carrier by railroad" was reviewed.

The distinguishing features of such an order affecting a status, which is subject to judicial review, are made manifest, by way of contrast, through the statement of this Court in *United States* v. *Los Angeles and S. F. R. R. Co.*, 273 U. S. 299, 309, 310, characterizing the type of order not subject to review:

> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or

criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."

(2) That the issue whether appellant is the type of carrier requiring a certificate under paragraph 18 for the "extension" of its lines is justiciable and not declaratory or advisory in character appears from the statement of this Court in *Texas and Pacific Ry. Co.* v. *Gulf etc. Ry. Co.*, 270 U. S. 266, 272-273, as follows:

"Paragraph 18 prohibits construction of an extension without obtaining a certificate. Paragraphs 19 and 20 provide that a carrier desiring to construct one may apply for the certificate * * * Whenever such an application is made, the commission may pass incidentally upon the question whether what is called an extension is in fact such; for, if it proves to be only an industrial track, the commission must decline, on that ground, to issue a certificate. A carrier desiring to construct new tracks does not, by making application to the commission, necessarily admit that they constitute an extension. *It may secure a determination of the question,* without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track * * * The prohibition of paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party

in interest opposing construction is entitled as of right to an injunction. The issue presented to the court by a denial that the proposed trackage is an extension does not differ in its nature from that raised when the denial is directed to the allegation that the defendant is an interstate carrier * * * If the facts are agreed, the question is one of law." (Italics ours).

The mere form of the order entered, incorporating findings contained in the Commission's report, and dismissing the petition without more, does not change its inherent character. The effect of the order in the present case was to grant to various steam railways (which intervened and opposed the petition) the affirmative relief which they sought, namely, that appellant be prevented from constructing the proposed lines, and, as a means of bringing about this end, that the Commission should assume authority over appellant under paragraph 18, and that the certificate required by said paragraph be denied.

Had the Commission refused the relief sought by the intervenors, and had it permitted appellant to construct its lines, the intervenors would have had the right, on the authority of the *Chicago Junction* case, 264 U. S. 258, 264, to sue to annul any order of the Commission allowing appellant to complete its lines.

It follows that appellant can sue to annul an order granting the relief sought by the intervenors. As said by this court in the case of *United States* v. *New River Co.*, 265 U. S. 533, 537, 539, 541, (where a like order dismissing a petition was entered):

> "The effect of the order is to grant the relief sought by the operators of local mines (the intervenors),"

That appellant has suffered legal injury by reason of the order is obvious (see *Chicago Junction* case, 264 U. S. 258). It in effect commands appellant not to build the lines, for unless the status established by the order is removed, appellant cannot construct the proposed lines without subjecting itself to fines and penalties (Sec. 1 (20) of the Act) or issue new securities (Sec. 20-a of the Act) or be free to exercise the power of eminent domain. (See *Alabama and Vicksburg Ry. Co.* v. *Jackson etc. Ry. Co.*, 271 U. S. 244).

(3) The following decisions are also believed to sustain the jurisdiction of this court on appeal:

> *The St. Louis and O'Fallon Railway Co., et al.* v. *United States et al.*, No. 131, October Term, 1928, Supreme Court of the United States, decided May 20, 1929.
>
> *United States et al.* v. *Missouri P. R. Co.*, No. 19, October Term, 1928, Supreme Court of the United States, decided January 2, 1929.

Baltimore and Ohio R. R. Co. v. *United States,* 277 U. S. 291.

Brimstone R. and C. Co. v. *United States,* 276 U. S. 104.

Cleveland C. C. and St. L. R. Co. v. *United States,* 275 U. S. 404.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of paragraph (4) of Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

CHARLES E. HUGHES,
CAMERON MORRISON,
H. J. HAYNSWORTH,
W. S. O'B. ROBINSON, JR.,

Attorneys for Piedmont and Northern Railway Co.

JOHN E. BENTON,

General Solicitor for National Association of Railroad and Utilities Commissioners.

JUNE, 1929.

[redacted]

TABLE OF CONTENTS

Page

The Opinion Below 1

Jurisdiction 1-4

Statement of Case 4-17

Specifications of Assigned Errors Intended to be Urged..... 17

Summary of Argument 17-22

The Argument:

I. The Distinctive Characteristics of Petitioner's Railway Differentiate It From Steam Carriers and Determine Its Classification As "An Interurban Electric Railway," Even If The Word "Interurban" Be Interpreted As a Word of Qualification Restricting the Scope of the Words in Question 22-32

II. Under the Transportation Act, 1920, An Interurban Electric Railway May Engage, As an Interstate Carrier, In the General Transportation of Freight, and Draw From This Source the Principal Part of its Operating Revenues, and May Interchange Freight and Participate in Through Routes With Steam Carriers Without Forfeiting the Exemption Which the Act Confers on Such Railways 32-41

III. The Court Below Erred in Interpreting the Word "Interurban" as Intended to Limit the Scope of the Words "Interurban Electric Railways" to a Class of Carriers Which are Primarily Engaged in the Local Carriage of Passengers and Freight, and Whose Interstate Operations Are, by the Hypothesis of the Classification, Necessarily Restricted and Limited in Extent 41-53

IV. If Petitioner's Railway is Within the Scope of the Words in Question its Ability "to Commit the Mischiefs of Uncontrolled Expansion Which the Act Was Designed to Prevent" Furnishes No Valid Reason for Denying to Petitioner the Exemption Which it Claims 53-55

TABLE OF CONTENTS (Continued)

Page

V. The Decree Below Denying Petitioner the Exemption Claimed Under Paragraph (22) of Section I of the Interstate Commerce Act, as Amended by Transportation Act, 1929, Cannot be Sustained Under the Principles and Rules of Interpretation Approved in Texas & P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266 55-60

VI. The Court Below Erred in Assuming That "Interurban Electric Railways" Within the Scope of Those Words in the Transportation Act, 1920, Are Not General Carriers; And in Holding That Petitioner's General Freight Business "Has Become So Great That it has Crossed the Line Between an Interurban Railroad, Engaged in the General Transportation of Freight, and a General Carrier Subject to the Provisions of the Statute" 60-64

VII. The Fact That Congress in the Railway Labor Act of May 20, 1926, (44 Stat. 577), Re-enacted and Brought Forward From Title III, Section 300, Paragraph (1), the Words in Question Which Had Been Interpreted by The U. S. Labor Board to Include the Piedmont and Northern Within the Scope of Their Meaning, Gives Rise to a Strong Presumption That the Interpretation Was in Accord With the Original Intention With Which Congress Used the Words in the Transportation Act, 1920..... 64-69

TABLE OF CASES

Page

Alexander v. The Mayor and Commonalty of Alexandria, 5 Cranch 1 67

Brotherhood Locomotive Engineers, et al, v. Spokane & Eastern Ry. & Power Co., et al, Decision No. 33, Docket 26-a, December 11, 1920) 30, 38, 64, 66

Cedar Rapids & I. C. R. & L. Co. v. Chicago & N. W. R. Co., 13 I. C. C., 250 46

Chicago & M. Electric R. Co. v. Illinois C. R. Co., 13 I. C. C. 20 46

Copper Queen Consolidated Mining Co. v. Arizona, 206 U. S., 474 67

Davis v. Pringle, 1 F. (2d), 860, 863 67

Dayton—Goose Creek R. Co. v. United States, 263 U. S. 456 59

Denn v. Reid, 10 Pet., 524 54

Dow v. United States, 226 Fed., 145 67

Edwards v. Wabash Ry. Co., 264 Fed., 610, 618 67

"Electric Railway Mail Pay," 58 I. C. C., 455 45

Ex Parte No. 38, 122 I. C. C., 414 ..... 39, 40

Great Northern R. Co. v. United States, 277 U. S., 172 3

Interstate Commerce Commission v. Illinois C. R. C., 215 U. S., 452, 469, 470 4

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S., 88 4

Interstate Commerce Commission v. Union P. R. Co., 222 U. S., 541, 547 4

Manufacturers R. Co. v. U. S., 246 U. S., 457, 489 4

Michigan R. R. Co. v. P. M. R. R. Co, 74 I C. C., 496, 497, 498 30

Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S., 324, 337 ..... 23, 44, 46

TABLE OF CASES (Continued)

Page

Railroad Commission v. Chicago B. & Q. R. Co., 257 U. U. S. 563, 585 43

Railroad Commission v. Southern P. Co., 264 U. S., 331, 341 43

Sacramento Northern Ry., 71 I. C. C. 653, 79 I. C. C. 782 39

Schweizer v. Mayer, 297 Fed., 334 67

Spokane & Inland Empire Railroad Co. v. United States, 241 U. S., 344, 346 48

St. Louis, Springfield & Peoria Railroad v. P. & P. U. Ry. Co., 26 I. C. C., 226 46

Texas & N. O. R. Co. v. Northside Belt R. Co., 276 U. S., 475, 72 L. ed., 661 31

Texas & P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S., 266 ..... 3, 4, 5, 55

United States v. Village of Hubbard, 266 U. S., 474 ..... 21, 23, 29, 30, 33, 38, 45, 46, 47, 59

TABLE OF STATUTES

Page

Act of June 18, 1910, Chap. 309, 36 Stat. 539, 551, 552 ..... 19, 34, 42, 50

Boiler Inspection Act as amended by Act of June 7, 1924, (36 Stat. 913; 43 Stat. 659) 40

Commodities Clause, 34 Stat. L., 584 68

Federal Control Act, March 21, 1918, 40 Stat., 451 ..... 29, 43, 49

Federal Possession and Control Act, 36 Stat., 645 43

Interstate Commerce Act, as amended by Transportation Act, 1920, (U. S. C. Tit. 49).

Sec. 1, (18) 2, 6, 17, 22, 24, 26, 37, 38, 54, 55, 57

Sec. 1, (20) 54, 63, 64

Sec. 1, (22) ..... 2, 17, 19, 20, 21, 22, 26, 34, 37, 38, 39, 41, 45, 53, 55, 56, 57, 59, 63, 64, 65.

Sec. 15, (1, 3, 6,) 32, 34, 36

Sec. 15, (3) 19, 23

Sec. 15a 18, 20, 23, 35, 36, 42, 51, 52, 56, 57, 59

Sec. 20a, (11) 30, 34, 39, 45, 64

Railway Labor Act of May 20, 1926, 44 Stat. 577 ..... 22, 64, 65

Railway Mail Pay Service on Urban and Interurban Electric Railways, 40 Stat. 748 45

Transportation Act, 1920, Ch. 91, 41 Stat.

Sec. 204 ..... 19, 23, 35, 36

Sec. 209 ..... 3, 19, 23, 35, 36

Sec. 300 ..... 22, 35, 38, 45, 65

Urgent Deficiencies Act, Ch. 32, 38 Stat. 200, 220, U. S. C. Tit. 28, Secs. 41 (28, 47, 47a) 3

TEXT BOOKS CITED

36 Cyc., 1153 67

25 R. C. L. Sec. 288 67

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

PIEDMONT AND NORTHERN RAILWAY COMPANY AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, *Appellants,*

VERSUS

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, ET AL., *Appellees.*

No. 164

On appeal from U. S. District Court of Three Judges, for the Western District of South Carolina.

BRIEF FOR PIEDMONT AND NORTHERN RAILWAY COMPANY, APPELLANT

The Opinion Below

The opinion of the U. S. District Court of three Judges (R. 222) is reported in 30 Fed. Rep. (2d) p. 421; and the report of the Interstate Commerce Commission in 133 I. C. C., p. 363.

Jurisdiction

Only one question is presented, to-wit:

Whether the U. S. District Court of three Judges erred in entering the final decree (R. 252) dismissing the appellant, Piedmont and Northern Railway Company's petition, and refusing to enjoin, set aside, and annul, as unauthorized, that part of the order of the Interstate Commerce Commission, dated April 3, 1928, in which

the Commission determined that the authority conferred on it by paragraph (18) of Sec. 1 of the Interstate Commerce Act as amended by the Transportation Act, 1920, extended to the construction of new lines of railway by said appellant; the error urged being that, upon the facts established, it appears as a matter of law that said lines were to be constructed as parts of an interurban electric railway, not operated as a part of a general steam railroad system of transportation, within the meaning of paragraph (22) of said section, and were therefore by that paragraph exempt from the authority conferred on the commission by paragraph (18).

In the court below the Commission's asserted authority over the new lines was challenged upon the further ground that they were to be constructed as parts of an entire project undertaken prior to the effective date of paragraph (18); and this ground is covered by the assignments of error and the designation of points to be relied upon by appellants, but is now, after further consideration, abandoned.

No complaint is here made, and none was made in the court below, with respect to that part of the order merely refusing a certificate of public convenience and necessity; as a review of that portion of the order would involve but an exercise by the court of the administrative function of granting a request which the Commission denied, in contradistinction to the question presented of whether or not, upon the facts established, the Commission exceeded its authority under paragraph (18), and thereby deprived the appellant Company of the exemption expressly conferred by paragraph (22) upon interurban electric railways, which it is submitted, is purely a question of law, involving, merely the construction of a statutory provision and the application of the provision as construed to admitted

facts, and which therefore is clearly subject to judicial review.

The bases of jurisdiction of this court and of the court below are dealt with in appellants' separate statement on jurisdiction filed under Rule 12, paragraph 1; but assuming that the question of the jurisdiction of the court below is raised upon the record we desire to add the following on that question:

Great Northern R. Co. v. *U. S.*, 277 U. S., 172, when read in connection with *Texas & P. R. Co.* v. *Gulf C. & S. F. R. Co.*, 270 U. S. 266, would seem to put at rest all doubt, if any could have existed, about the jurisdiction of the court below to entertain this suit under the Urgent Deficiencies Act (Ch. 32, 38 Stat. 200, 220; U. S. C. Tit. 28, Secs. 41 (28) and 47, 47-a). In the Great Northern case it was held that a certificate issued by the Commission pursuant to Sec. 209 of the Transportation Act, 1920, of the amount due the Great Northern upon the termination of Federal control under the guaranty of revenue, was not within the scope of the remedy provided by the Urgent Deficiencies Act, because issuing the certificate was not "a part of the Commission's delegated power to regulate commerce, and (was) is not an incident of such regulation." Undoubtedly the corollary is equally true and an order made by the Commission as a part of its delegated power to regulate commerce, and as an incident of such power is within the scope of the remedy. The Texas & Pacific case holds that whenever an application is made to the Commission by a carrier for a certificate of public convenience and necessity, "the Commission may pass incidentally upon the question" of its authority in the premises. It is, of course, authorized to pass on this question as a part of its delegated power to regulate commerce, and as an incident of such power.

The order affirmatively determining the character and status of the mileage in question would, we assume, in view of the decision in the Texas & Pacific case, be given binding effect in any future suit or proceeding involving the right of the Railway Company to construct the mileage, unless set aside or annulled. (See *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, 469, 470; *Interstate Commerce Commission* v. *Union P. R. Co.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S., 88; *Manufacturers R. Co.* v. *U. S.*, 246 U. S., 457, 489). Therefore, the remedy provided by the Urgent Deficiencies Act must be available to review the legality of the order, because otherwise the rights of the Railway Company might be prejudiced.

Statement of Case

Piedmont and Northern Railway Company, a corporation organized under a Special Act of the Legislature of South Carolina (R. 210 and 217), and engaged as a common carrier in the transportation of persons and property in interstate commerce, owns and operates a line of electric railway in South Carolina, extending from Greenwood to Spartanburg, a distance of 89.9 miles, with a branch from Belton to Anderson of 11.3 miles; and also a line of electric railway in North Carolina extending from Gastonia to Charlotte, a distance of 23.5 miles, with a branch to Belmont of 3.2 miles, making in all 127.9 miles. (R. 222). In the early part of 1927, the corporation was about to begin the construction of additional lines, 128 miles in length, to be operated in conjunction with the existing lines, and consisting of a line about 53 miles in length, running from Spartanburg, South Carolina, to Gastonia, North Carolina, which would connect the existing lines, and also a line 75 miles in length extending from Charlotte in a northeasterly direction to Winston-Salem,

in the latter state, so as to constitute, together with the existing lines, a continuous line of railway, extending in a northerly direction from Greenwood, South Carolina, to Winston-Salem, North Carolina, which, with the two branches above referred to, would have a total mileage of approximately 256 miles. (R. 222).

The Company was proceeding upon the assumption that the lines were "interurban electric railway," and that therefore it was not necessary to apply to the Commission for a certificate of public convenience and necessity authorizing their construction. (R. 142).

The project, however, came to the attention of the Commission, and it notified the Company's President by letter of March 8, 1927, "that before the Piedmont and Northern constructs any extensions to its lines or issues any securities, it will be expected to file appropriate applications for authority therefor under Secs. 1 and 20a. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention. In this connection, I desire to call your attention to the opinion of the Supreme Court of the United States in *Texas & Pacific Railway* vs. *Gulf, Colorado & Santa Fe Railway Company*, 270 U. S. 266." (R. 113).

On March 26th, 1927, the Company did file the required application for a certificate of public convenience and necessity, if deemed to be necessary. (R. 11). The question of the Commission's authority in the premises, because of the alleged interurban character of the lines, was duly raised and reserved both in the application itself (R. 17), and by motion to dismiss the application for lack of authority in the Commission to issue the certificate. (R. 28).

After extensive hearings, the Commission, on April 3rd,

1928, issued its report, in which it first determined that the authority conferred upon it by paragraph (18) did extend to the construction of the new lines, and further determined that they were not required in the interest of public convenience and necessity. (R. 29).

The appellant Company filed its petition in the court below on May 22nd, 1928, (R. 1). A court of three Judges was organized under the Act of October 22nd, 1913, (Ch. 32, 38 Stat. 222; U. S. C. Tit. 28, Sec. 47). The National Association of Railroad & Utility Commissioners was allowed to intervene in support of the petition (R. 112), while the Interstate Commerce Commission and the Southern Railway Company and other steam railroads, who had opposed the application before the Commission, were allowed to intervene in opposition to the petition and in support of the Commission's authority.

Upon the hearing in the court below, appellant Company put in evidence the letter of March 8, 1927, heretofore referred to, (R. 112); and also the record made in the proceedings before the Commission, consisting of the evidence before the Commission upon which the order complained of was based, including all exhibits introduced before the Commission and the Company's returns to the Commission's questionnaire. (R. 114).

The narrative of the evidence incorporated in the record before this court omits so much of the record before the Commission as relates exclusively to the issue of convenience and necessity; but, as stipulated and agreed upon by counsel (R. 209), and as approved by the court below (R. 210), it "contains all of the evidence introduced before the court (below) **** which is in any way material to the issues and questions as to the jurisdiction and authority of the Interstate Commerce Commission involved" upon this appeal. (R. 209, 114).

The material facts, as established by the evidence before the Commission, are not in dispute and are fully, fairly and accurately stated in the opinion of the court below; except in a few particulars, which the court overlooked or did not deem sufficiently material to be stated, but to which we shall call attention in the argument here made.

The court first disposed of the contention, made on behalf of the Government, that appellant's Railway is operated as a part of "*a* general steam railroad system of transportation," because it is operated as a part of *the* general transportation system of the United States, in that it interchanges freight and participates in through routes with steam railroads.

It said:

> "It is obviously electric, and there can be little doubt that it is not operated as part of 'a general steam railway system.' The operation of the road, it is admitted, is entirely in the hands of the Piedmont and Northern Railway Company, independent of any other railroad corporation; and it is not a part of any other system of transportation unless that phase is taken in a broad sense to mean the whole aggregation or net work of railways of the United States which are physically connected for the interchange of business. In this sense the petitioner is a part of a railroad system, since, as will presently appear, it has physical connections and through traffic arrangements with steam roads which give it access to all parts of the country." (R. 230).

Then, after reviewing the various statutory provisions in which the term "railway system" has been used by Congress sometimes in a general and sometimes in a restricted sense, and the authorities construing these provisions, the court continued and concluded:

"Section 422, 41 Stat. 488, adding Section 15a to the Interstate Commerce Act, confers upon the Commission the power to prescribe just and reasonable rates for railroad carriers and contains the so-called recapture provision by which the excess income of railroads is returned to the United States. Paragraph 6 provides that 'the value of railway property and the net railway operating income of a group of carriers which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system.' The Interstate Commerce Commission applied this section in Excess Income of St. Louis & O'Fallon Ry. Co., 124 I. C. C. 3, 11, and held that in the absence of any contrary indication, it must be assumed that Congress had in mind the usual meaning of the word system as applied to railroads, implying an operating relationship and unity and involving (1) common control, (2) common management and (3) operation as a system. A similar construction was given by the Commission to the same term in Paragraph 22 of Section 1 of the Act now under consideration, in the cases of the Michigan United Rys. Co. 67 I. C. C. 452, and Sacramento Northern Ry. 71 I. C. C. 653. These rulings in our opinion were correct. They are borne out by the phraseology of the excepting clause in Section 15a wherein Congress excluded from the authority of the Commission 'interurban electric railways, unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight.' If the broad significance for which petitioner contends should be given to the first clause in this alternative, there would be no need for the second, for it is a matter of common knowledge that physical connections are established between the two kinds of railway to enable the interurban to engage the more readily in the general transportation of freight." (R. 232).

"We conclude that the Piedmont and Northern is

not a part of a general steam system of transportation, within the meaning of Paragraph 22, Section 1." (R. 233).

The court stated that the inquiry was thus "reduced to the single question whether the Piedmont and Northern is an interurban railway." (R. 230).

The opinion gives, in part, the history of the organization of the Company and the development of its railway as follows:

"As early as 1910, a group of men, headed by the late James B. Duke and William S. Lee, now President of the Piedmont and Northern, having realized the possibility of a great industrial development in this section (the Piedmont section of North and South Carolina), in connection with the use of hydroelectric power, formulated a project to build a high speed electric railroad to connect with the street railway system in the cities en route. The plan was announced to the public in 1910, and various steps were taken to carry it into effect. Thus the Piedmont Traction Company was incorporated on January 6, 1910, *under the general laws of North Carolina, to operate street railways by electricity or other power,* extending not more than 50 miles from Gastonia. It constructed and later conveyed to the petitioner its present line between Gastonia and Charlotte. On March 10, 1910, the Greenville, Spartanburg, and Anderson Railway Company was incorporated, with like provision as to motive power, *under the general laws of South Carolina.* It acquired *an interurban electric railway* between Belton and Anderson, constructed a line between Greenwood and Greenville, and later conveyed both to the petitioner.

"On January 10, 1911, J. B. Duke, W. S. Lee and other interested persons, as managers, entered into an agreement called the 'Piedmont Syndicate' with certain subscribers to acquire, by purchase or construction, a system of railways to carry passengers

and freight in the several counties in North and South Carolina, through which the present and proposed lines of the petitioner run. Stock was offered to the public, and it was explained that it was proposed to build such a line and that the Syndicate was formed to buy certain lines already built which would be suitable to carry out the project. Large powers were conferred upon the managers, with discretion to determine from time to time whether it was for the interest of the Syndicate to proceed with the project or abandon it.

"The Piedmont and Northern Railway Company was incorporated by special act of the General Assembly of South Carolina, approved February 24, 1911, with a capital stock of $5,000,000, with power to construct and operate a line or lines of railway, to be operated by electricity or other motive power. ***** Power was given to construct, acquire and operate street railways run by electricity or other motive power. The consolidation of the new company with the Greenville, Spartanburg and Anderson Railway Company and with any other railway company chartered in any State through or near which the Piedmont and Northern proposed to pass, was expressly authorized.

* * * * *

"The actual construction of the present lines took place between 1912 and 1914. The line from Gastonia to Charlotte was completed in July, 1912; that from Greenwood to Greenville in November, 1913, and that from Greenville to Spartanburg in April, 1914." (R. 225, 226, 227).

Then saying that, in order to escape the Commission's authority, petitioner must show "it is *an interurban railroad, a matter which can only be determined by a consideration of the matter of its construction and equipment and the business which it conducts.*"(1) the court continued;

(1) All italics are ours except where otherwise indicated.

"The existing lines of the Piedmont and Northern have connections with the street railway systems of the cities which it serves, acquired either by direct ownership or by contracts for trackage rights. Thereby its passenger cars within the cities enroute become street railway facilities. Between the cities there are frequent stops for passengers at an average distance of 1.2 miles apart—that is to say, 106 stops in 128 miles of road. 49 passenger trains daily traverse various parts of the line. There are more daily trains and more frequent stops than on the corresponding mileage of the Southern Railway. Furthermore the spacing between the trains is more uniform. The passenger cars are motivated by self-contained motor units, and are lighted from a trolley. By reason of their equipment, they are not (un) acceptable upon steam lines.

"The use of city streets for the collection and delivery of freight is a peculiar characteristic of the Piedmont and Northern and other interurban roads. Its electric locomotives and cars are constructed to take the sharp curves and steep grades peculiar to the city streets. It is even possible for electric locomotives to go inside a building where a steam locomotive cannot go. *The switching service thus made available in the cities is extremely convenient for industries of all sorts, including factories, wholesale houses and even retail houses. The street railway lines are used largely for delivery and pick up service;* but the bulk of the through traffic does not move over the city streets.

"Local freight service between cities on the petitioner's lines is also more flexible and convenient than that rendered by the steam railways. There are more daily freight trains in small units. 18 trains which average 14 loaded and 6 empty cars, are operated daily. There are more frequent stops on the Piedmont and Northern than on the Southern in local station to station movement of freight. In addition, there are local switches for industrial plants, so that *freight is delivered and picked up all over the line.* In

the delivery of less than car load freight in short distances up to sixty miles, there is more expedition and greater dispatch than in the handling of similar business on the Southern. The electric locomotives for the movement of freight are of somewhat lighter character than those employed on the steam roads and are unfit for long haul heavy load traffic such as that hauled by the electric locomotives on the Virginian railway. The cars and locomotives are so equipped that they can be used either upon a voltage of 1500 d. c. between the cities or 600 d. c. inside the cities." (R. 233, 234).

"The difference between the local freight service of the Piedmont and Northern and that of the steam railroads consists chiefly in the use of the street railway systems to gather up and deliver freight in the cities, the greater number of local freight stations on its lines between cities, the operation of its freight trains in smaller units and with greater frequency, and of a speedier delivery of local freight between nearby points.

"The local passenger and local freight business thus described give to the road the peculiar features upon which the petitioner relies to distinguish it from the ordinary steam railroad. But this business constitutes only a small part of the petitioner's operations. Far greater is its general freight business, made possible by interchange relations with steam trunk lines in the south through which it is connected for the receipt and delivery of property with vast sections of the United States. Upon this phase of its activities, the Commission, in its opinion, and the opponents of the petitioner in this case depend to show that the road is not merely an interurban electric railway, but something far more important in the business of transportation. In the nature of things, its extra-interurban operations consist of freight movements. This is so because the great bulk of its passenger traffic is local and is carried in cars which cannot be used on steam roads; while its freight cars

can be and are freely interchanged with connecting steam railroads.

"The road bed, rolling stock and equipment are of such a character that it is well suited to co-operate with steam railroads in the transmission of freight to distant points. Freight trains of 45 cars, using 2 locomotives, are not unusual; the average train is 20 cars. Most of the freight traffic is handled in cars owned by steam railroads but the petitioner owns 165 automobile cars and 99 other box cars, all of which are of ordinary steam railway type and move freely on foreign roads. Altogether, there are 337 cars. The construction is that of a standard steam railway. Expensive grading was undertaken; and grades and curves are suitable for heavy traffic. Rails are of 80 lb. section. Bridges were made as strong as those on the Southern Railway, and the locomotives purchased were heavier than was necessary for merely local traffic. The purpose of the builders from the beginning was to construct a line of railroad which would aid in the industrial development of the Piedmont region and serve as a means by which mills and factories could find connections with the steam railroads of the country for the delivery of freight. Points of contact with carriers extending to outside territory have been obtained in as large a number as possible. Traffic agreements have been made with the Seaboard Air Line, the Southern Railway and other roads with reference to rates and the division of revenue received in the interchange of traffic. While street railways have been used for local deliveries, the through freight does not pass through the cities, but is carried over additional lines which run around the cities and avoid the city streets."

"The business methods of the road are similar in many respects to those of steam railroads. It is a party to the tariffs of the steam roads and to the uniform express contract of the American Railway Express Company. It is a member of the American Railway Express Company. It is a member of the American Railway Association, the Southern Freight

Association and other traffic organizations of the steam roads. It is represented by powers of attorney in nearly every tariff bureau of the United States and has 502 published tariffs. It follows the methods of steam roads in matters of rate divisions, interline billing, claim settlements and in all of its relations with shippers and consignees. It publishes a tariff directory which is on file with the Interstate Commerce Commission. It has a general agent in New York, a commercial agent at Atlanta and at all of its connecting points.

"The entire territory east of the Mississippi is tributary to the road in that freight originating on and destined to it is derived from or moves to every part of that section of the United States. While the matter had not been studied in retail, the evidence tended to show that the road also sends freight beyond the Mississippi to the Pacific coast and to New England.

"The distribution of operating revenues very clearly tells the story. Petitioner's witnesses, speaking in round figures, state that 92% of the revenue is derived from freight and only 8% from passenger traffic. The detailed figures for 1926 show even a greater disparity. (Given in footnote, p. 237). The contrast between the revenues from local business and that from business interchanged with steam roads in 1926 is equally striking. While 97.63% of the passenger revenue was derived from local traffic, and only 2.37% from interchange, the reverse is true with revenues from freight of which only 4.75% came from local station to station movement and 95.25% from traffic handled jointly with steam roads. Of 72,886 loaded cars handled, 68,370 were interchanged, most of them in interstate movement, reaching all parts of the United States.

"*The proposed extensions would not alter the character of the petitioner's business.* There would be the same local service in the transportation of passengers and freight since the railway would connect

with street railways of the cities enroute. At the same time the interchange of freight business with steam railroads would be greatly increased. Indeed if the road should be completed so as to form a continuous interstate line in North and South Carolina, it would constitute the interior connecting link in a new joint through route and in effect, a new trunk line will be formed in addition to those now provided by the systems of the Southern, the Seaboard and the Atlantic Coast Line; for the Piedmont and Northern would then connect with the Georgia and Florida at Greenwood, South Carolina, on the south, and with the Norfolk & Western at Winston-Salem, North Carolina, on the north. Numerous new connections with steam roads would then be made and many new points in distant sections of the country would become accessible; and the railway would become to an increased extent an integral part of the great interstate railway system of the country.

"The amount and character of the new business which would be done in the first year of the construction of the extensions has been estimated by officials of the petitioner as follows:

Freight	$3,597,384.00
Passenger	196,502.15
Express	70,260.76
Miscellaneous	25,869.66
	$3,890,016.57

During the succeeding five years, an increase each year of 8.4% over the preceding year would be expected.

"It will be observed that the existing predominance of freight over passenger revenues would continue. It is estimated that the freight traffic would have its origin in the following manner:

Local traffic having origin and destination on the Railway's lines 21%

Traffic originating beyond and destined to the Railway 44%

Traffic originating on the Railway and destined to points beyond 20%

Overhead or bridge traffic 15%

"The proportion of bridge traffic estimated shows that it would be still of minor importance as compared with the traffic which originates on or is destined to points on the Railway. The opposite is true of the Southern Railway in the Piedmont District." (R. 234-239).

Upon the foregoing facts, after discussing the Acts of Congress dealing with electric railways and many of the authorities, the court said, among other things, that "Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and *should be engaged in the local carriage of passengers and freight, as its primary business,* the extension of its line would remain a matter of local concern and should be left to the regulation of local authority"; that while "it is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute, ** there is no difficulty in the case at bar in determining that the Piedmont and Northern has ceased to be primarily an interurban railroad." (R. 246-247). It concluded that the Company's "freight traffic dominates so completely the field of its operations, and reaches so far, through interchange with other railroads, that it is outside the class which Congress intended to exclude from the control of the Commission; (that) even

if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so similar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent," (R. 251), and therefore upheld the Commission's authority in the premises and entered the final decree denying the relief prayed by petitioner and dismissing the petition. (R. 252).

Specification of Assigned Errors Intended to be Urged

Appellant will here urge Errors III, IV and V, as set forth in the assignments of error (R. 258-259), and as summarized under Point 1 (a) and (c) in the Statement of Points to be relied upon by appellants (R. 268-269).

These errors and points raise the question heretofore stated, whether or not, upon the facts established, the proposed lines were to be constructed as parts of an interurban electric railway, which is not operated as a part of a general steam railroad system of transportation, and were therefore by paragraph (22) of Sec. 1 of the Interstate Commerce Act exempt from the authority conferred on the Commission by paragraph (18).

SUMMARY OF ARGUMENT

I.

Paragraph (22), Sec. 1, of the Interstate Commerce Act, as amended by the Transportation Act, 1920, provides that the authority of the Commission conferred by paragraphs (18) to (21) inclusive shall not extend to the construction or abandonment of street, suburban or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

II.

The Piedmont and Northern Railway is operated only by electricity, and there is no relationship between it and any steam railroad system of transportation except that it interchanges freight and participates in through routes with several steam railroads.

III.

Congress did not intend the word "interurban" to limit the scope of the words "interurban electric railways" to a class of carriers which are primarily engaged in the local carriage of passengers and freight, and whose interstate operations are, by the hypothesis of the classification, necessarily restricted and limited in extent as compared with the ordinary steam railroad; but on the contrary used the word "interurban" to describe that type of electric railways whose operations are *not* local and limited in extent as compared with street and suburban electric railways; for

(1) Congress in the Transportation Act, 1920, dealt with interurban electric railways as interstate carriers.

(2) In Sec. 15a Congress made provision for "interurban electric railways . . . engaged in the general transportation of freight," and included them among the carriers "put under the fostering guardianship and control of the Commission," "in order to provide the people of the United States with adequate transportation" instead of including them along with "(a) Sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam rail road system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility,

owned exclusively and maintained, operated and controlled by any State or political sub-division thereof," which were excluded from the provisions of Sec. 15a.

(3) In Secs. 204 and 209 of the Transportation Act, 1920, Congress gave authoritative recognition to the fact that interurban electric railways may draw the greater part of their operating revenues from freight traffic.

(4) In Sec. 15 (3) of the Interstate Commerce Act, Congress brought forward the provisions of the Act of June 18, 1910, which authorizes the Commission to establish through routes, classifications, practices, rates, fares and charges between electric railways engaged in the general business of transporting freight and railroads of a different class.

(5) Acts of Congress prior to the Transportation Act, 1920, decisions of the courts, and rulings of the Commission in which electric railways were grouped under the three general heads of street or urban, suburban, and interurban electric railways, in differentiating them from steam railroads, give rise to the presumption that Congress in adopting the same nomenclature and in following the same grouping in the Transportation Act, 1920, intended to make the same differentiation.

IV.

The fact that the greater part of the traffic of an interurban electric railway comes from the general transportation of interstate freight, and that most of its traffic is interchanged with steam railroads, does not under the provisions of the Interstate Commerce Act, as amended by the Transportation Act, 1920, warrant its being placed in the same category as a general steam railroad so as to deprive it of the exemption given to interurban electric railways not operated as a part or parts of a general steam railroad system of transportation by paragraph (22), Sec. 1; for

(1) Passenger traffic and the local carriage of freight and passengers are not a distinctive service of all interurban electric railways, especially in view of the fact that they are regulated and controlled by Congress as carriers engaged in the interstate transportation of passengers and freight; any more than freight traffic and the interstate carriage of passengers and freight are a distinctive service of all steam railroads.

(2) Congress intended the exemption of interurban electric railways given in paragraph (22) to depend upon whether they are operated as a part or parts of a general steam railroad system of transportation, instead of upon whether they are engaged in the general transportation of freight; for

(a) The fact that the exception in Sec. 15a covers interurban electric railways engaged in the general transportation of freight, or operated as a part of a general steam railroad system of transportation, while the exception to the exemption given by paragraph (22) only covers those operated as a part of a general steam railroad system of transportation, shows that Congress did not intend that an interurban electric railway should be denied the exemption on the ground that it is engaged in the general transportation of freight.

(b) If the test of the exemption which the statute prescribes should be disregarded and the right to the exemption should be made to depend upon the amount and extent of the freight business of the railway claiming exemption, the status of many electric railways will be rendered obscure and uncertain, contrary to the intention with which Congress should be presumed to have acted in view of the severe penalties imposed for the construction or abandonment of a line of railway, or for the issuance of securities without the authority and approval of the Commission by a carrier other than an interurban

electric railway which is not operated as a part or parts of a general steam railroad system of transportation.

V.

The Piedmont and Northern Railway Company's claim to the exemption given by paragraph (22), Sec. 1, of the Interstate Commerce Act, as amended by the Transportation Act, 1920, is supported by the decision of the court in *United States* v. *Village of Hubbard,* 266 U. S. 474.

VI.

The decree below denying the Piedmont and Northern Railway Company the exemption which it claims under paragraph (22) of Sec. 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, cannot be sustained under the principles and rules of interpretation approved in *Texas & P. R. Co.* v. *Gulf C. & S. F. R. Co.,* 270 U. S. 266.

VII.

The Piedmont and Northern Railway has been organized, developed and constructed, and has always been operated, and until March 8, 1927, when the Commission directed that it apply for a certificate authorizing the construction of the mileage in question, had always been officially treated and dealt with by the Commission, the U. S. Railroad Administration, and the U. S. Labor Board, as an interurban electric railway; and even if the word "interurban" should be interpreted as a word of qualification restricting the scope of the words in question the Piedmont and Northern Railway must be differentiated from the ordinary steam railroad and classified as an interurban electric railway on account of its distinctive methods of operation and manner of service, consisting principally in the use of city streets and street railway systems to gather up and distribute freight in cities, the pick up and delivery of freight and switching all along its line, and the frequent operation of trains in small units.

VIII.

The fact that Congress in the Railway Labor Act of May 20, 1926, (44 Stat. 577), re-enacted and brought forward from Title III, Section 300, Paragraph (1), Transportation Act, 1920, the words in question which had been interpreted by the U. S. Labor Board to include the Piedmont and Northern within the scope of their meaning, gives rise to a strong presumption that the interpretation was in accord with the original intention with which Congress used the words in the Transportation Act, 1920.

ARGUMENT

I

The Distinctive Characteristics of Petitioner's Railway Differentiate it From Steam Carriers and Determine its Classification as "An Interurban Electric Railway," Even if the Word "Interurban" Be Interpreted as a Word of Qualification Restricting the Scope of the Words in Question.

Transportation Act, (February 28), 1920, Chap. 91, Sec. 402, 41 Stat. at L., 456, 477, 478, (U. S. C. A. Tit. 49, Sec. 1, paras. 18 & 22), provides (para. 18): ". . . no carrier by railroad subject to this Act shall undertake the extension of its line of railroad . . . unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such extended line . . ." Paragraph (22): "The authority of the commission (so) conferred . . . shall not extend to the construction . . . of street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The opinion of the court below disposes of the contention that because petitioner's railway interchanges freight and participates in through routes with steam railroads, and to that extent is a part of *the* general transportation

system of the United States, it is operated as a part of "a general steam railroad system of transportation"; so that the single inquiry is whether it is an interurban electric railway. In asmuch as the proposed extensions will not alter the character of petitioner's business (R. 237), we shall, except as otherwise indicated, refer to the railway as including both the existing and proposed lines, and for convenience shall refer to appellant, Piedmont and Northern Railway Company, as petitioner.

No definition of "an interurban electric railway" is given in the Transportation Act or in any other Act of Congress dealing with such carriers, and the question is what scope is to be given to those words.

Congress in the Transportation Act, 1920, dealt with interurban electric railways as interstate carriers, which were engaged, or might engage in the general transportation of freight, (Sec. 421; U. S. C., Tit. 49, Sec. 15a), which might draw the major part of their operating revenue from freight traffic or from other sources (Secs. 204, 209); and which did or might interchange traffic and participate with steam railroads in interstate joint through routes. (U. S. C., Tit. 49, Sec. 15 (3)). Congress therefore intended to regulate, and to include within the scope of the words in question, interurban electric railways as carriers of interstate freight and passengers. The word "interurban" was *not* used to designate a road whose operations are limited in extent and primarily local as compared with steam railroads, but on the contrary was used to designate that type of electric railway whose operations are *not* local and limited in extent as compared with street and suburban electric railways. (See *United States* v. *Village of Hubbard,* 266 U. S. 474, 478; *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission,* 230 U. S. 324, 337). Congress adopted the nomenclature commonly applied to electric railways, and in grouping

them under the usual three general heads, used the word "interurban" as the superlative of the three words "street, suburban and interurban."

We shall later on undertake to demonstrate the truth of the foregoing propositions, but for the present we merely state them, as the first point we wish to make is that if Congress intended by the use of the word "interurban" to distinguish interurban electric railways from other general carriers engaged in interstate commerce, the manner of petitioner's service and its methods of operation are such as to control and determine its classification as an interurban electric railway, and that, possessing these distinguishing characteristics, petitioner's railway cannot be excluded from the scope of the words in question and denied the exemption which the statute gives to carriers within their scope, merely because it possesses other characteristics and performs functions common to all carriers by rail, including, of course, steam carriers. Classification, where required, must be predicated upon distinctive rather than common characteristics.

(1) The history of petitioner's organization and development cannot be disregarded; and we submit that this history shows that petitioner was organized and has been developed, operated and officially treated and dealt with as an interurban electric railway, and as such it proposes to construct and operate the extensions in question. Surely there can be no suggestion that its claim to such descriptive name is now put forth as a subterfuge to escape the authority conferred upon the commission by paragraph (18) of Section 1. The first line acquired, by the originators of the project, was an *interurban electric railway* from Belton to Anderson, South Carolina, a distance of about 10½ miles; the street railway systems in the cities to be connected were either acquired or trackage rights secured over them (R. 117); the present North Carolina mileage

was constructed by a street railway corporation organized under the general laws of the state of North Carolina; the South Carolina mileage between Greenwood and Greenville was constructed by the Greenville, Spartanburg & Anderson Railway Company, organized under the general laws of that state. (R. 121). The Piedmont Syndicate, which was formed for the purpose of carrying out the plan of constructing an electric interurban railway through the Piedmont Section of the two states, provided for the acquisition by purchase or construction of a number of connecting or separate lines of railway for the transportation of passengers and *to the extent permitted by law of freight* in the several counties named in the syndicate agreement. (R. 121, 122). The Piedmont and Northern Railway Company itself was incorporated by Special Act of the General Assembly of South Carolina, approved February 24, 1911. While under its charter it is given broad powers, including the right to use electricity or other motive power, and to acquire by purchase or construction, either directly or through subsidiaries, and to operate lines of railroad and railway as well as street railways (R. 122), it has never used any motive power except electricity, has never acquired any line of railway except those constructed by the Piedmont Traction Company and the Greenville, Spartanburg & Anderson Railway Company, and the interurban electric line between Belton and Anderson, nor has it, itself, ever constructed any line of railway except the existing line in South Carolina from Greenville to Spartanburg. (R. 122, 133). It proposes to construct and operate the extensions in the same manner in which the existing mileage was constructed and is operated, connecting the extensions with the street railways of the cities en route, just as the existing mileage is connected with the cities it serves. (R. 117, 120, 237).

Although the court held that the entire project, includ-

ing the construction of the proposed extensions, had not been definitely undertaken prior to the effective date of paragraph (18) of Sec. 1, and the contention to the contrary has been abandoned in view of the decision below, it is conceded that "the evidence . . . shows clearly that the plan for a continuous line of electric railway through the Piedmont section of North and South Carolina from Greenwood and Anderson on the South to Durham and Winston-Salem on the North was conceived long before the year 1920" (R. 225). The court also called attention to other admitted facts plainly showing "an early intention to build the continuous line" (R. 227), thus making it manifest that petitioner's claim of the right to construct the proposed extension under the exemption conferred by paragraph (22) of section 1 is put forth in entire good faith.

(2) The construction and equipment of an interurban electric railway interchanging freight and participating in through routes with steam carriers, as such a railway may do under the Act, must necessarily largely be of standard type; but, in so far as there is any inherent difference, petitioner's construction and equipment are of the standard interurban type. Its lines tie in with the street railway systems; it owns and operates the street railway system in the City of Gastonia and has trackage rights over approximately 12 miles of street railway tracks in the Cities of Charlotte and Greenville (R. 140, 207); its passenger cars and freight locomotives are designed to operate over a high degree of track curvature as in cities, and are operated by self-contained motor units to which power is supplied by overhead trolley; a 1500 d. c. voltage is used between cities and a switch arrangement provided so that in cities the voltage may be reduced to 600 volts, ordinarily used on street railways; freight traffic is hauled by electric locomotives designed to serve local conditions and unfit for

a line with a long haul and heavy load traffic; only its box cars and automobile cars are suitable for interchange with steam lines. (R. 138, 139).

(3) Petitioner's methods of operation and manner of service are distinctive from those of the ordinary steam railroad. This is conceded as to its passenger traffic. As to the freight traffic, city streets are used for the collection and delivery of freight, except that lines are provided around the cities for the movement of such through freight as does not need to go over the city streets; outside the cities freight is delivered and picked up and a switching service performed all along the line; freight trains are run in small units, more frequently, and the stops are closer together than is customary on steam railroads; local switches are maintained for industrial plants all over the line; and electric locomotives and cars are operated around sharp curves and over steep grades, it being possible for an electric locomotive to go even inside a building where a steam locomotive could not go. (R. 121, 140, 151).

This method of operation is followed and this service is rendered both in the handling of local freight, having both origin and destination on petitioner's lines, and in the receipt and delivery of interstate or through freight having either origin or destination on its lines. There would be no reason for making any distinction between the two classes of freight, and none is made. (R. 142, 238, 239).

Petitioner's Traffic Manager testified upon cross-examination (R. 153):

> "Interstate freight as we handle it is local in character, in that the service performed at the delivery and the initial points is purely local. To us we do not distinguish between the handling of interstate and intrastate traffic for the reason that it is a purely local

> traffic with us, whether it goes off our line a short distance or whether it stays on the line. Therefore, the distinction as to interstate traffic would not apply in the same way to the Piedmont and Northern as it would to longer lines. The reason I say that a large part of our traffic is local is because of the comparatively restricted scope of the length of our line."

And its President said that petitioner's railway was such that it could "gather up traffic from the various industries and handle it to the trunk lines and thereby reach the through business as well as serve the local business." (R. 121).

There was no contradiction of this evidence, but on the contrary the protesting steam railroads undertook to show that they too render the same sort of service, yet, as the court finds, failed to show it. (R. 234, 235). If they had shown it, obviously the showing would not have had the effect of changing the character of petitioner's railway, but at most of merely adding to the characteristics of those of protestants.

The difference between the freight service of petitioner's railway and that of the ordinary steam carrier is further indicated by two facts to which the court below did not call attention.

First, the less-than-carload business of petitioner is, in tonnage, approximately *20%* of its total business (R. 156); whereas for the United States as a whole such business is *2.79%* of the total tonnage; for the southern region *3.84%*; for the entire southern district *3.08%*; for the New England region *6.74%*; for the entire eastern district *2.73%* (R. 163); and the Vice-President of the Southern Railway Company in charge of traffic gave "the purely local less-than-carload traffic in the territory (in question) as being under 1%." (R. 172).

Second, the mean length of haul of freight traffic on the Piedmont and Northern is 28.8 miles, while the average haul on the Southern for the year 1926 was 187.43 miles; the earnings per car to the Southern on traffic in and out of the territory in question being $126.16 and to the Piedmont and Northern $43. and odd cents. (R. 169). The figures for the Piedmont and Northern were given by the Assistant to the President of the Southern Railway Company in estimating the loss which his company would sustain by the construction of the additional lines, and, as we understand, are estimates of petitioner's average haul and earnings per car with the proposed extensions in operation.

(4) Petitioner has been officially treated and dealt with as an interurban electric railway, at all times until the receipt of the Commission's letter of March 8, 1927, (R. 112). It has been required to file with the Commission reports of its finances and operations under the accounting rules governing electric railways (R. 143); see *U. S.* v. *Village of Hubbard*, 266 U. S., 474, 477); it was taken over by the government under the proviso contained in the seventh paragraph of Sec. 1 of the Federal Control Act of March 21, 1918, (40 Stat. L., 451), including within "Federal control" interurban electric railways whose principal source of operating revenue was freight traffic; it was included in the "list of properties in Federal control as of January 1, 1919, including steam roads, switching and terminal companies, electric roads, steamship lines, ferry lines and water carriers, canal and inland waterways, pullman car lines," and in such list was set out under the heading "Electric Lines Operated," (see letter of October 1, 1919, from Walker Hines, Director General, to Hon. J. J. Esch, Chairman House Committee, Interstate and Foreign Commerce, U. S. House Hearings, 66th Congress, 1st Session, Vol. 15, p. 2796). It was included in the

"Memorandum Concerning Electric Railway Companies Reporting to the Interstate Commerce Commission for the Calendar Year 1917," referred to in the 5th foot-note of the opinion *U. S.* v. *Village of Hubbard*, 266 U. S. 474, 478. The Commission on October 12, 1920, ruled informally that it was an interurban electric railway not operated as a part of a general steam railroad system of transportation, and therefore within the exception contained in Sec. 20a exempting such railways from the authority of the Commission over the issuance of carrier securities (R. 143); and on December 11, 1920, the United States Railroad Labor Board (Decision No. 33, Docket 26-a), ruled that for the same reason it was not subject to the jurisdiction of the Labor Board.

(5) The statement that "the *business* methods of the road are similar in many respects to those of steam railroads" (R. 236), surely furnishes no justification for classifying petitioner with steam railroads. Under the Act an interurban electric railway may, and petitioner does, do business with steam railroads, interchanging freight and participating in through routes with them. It can not do this, without adopting "business methods . . . similar in many respects to those of steam railroads." The law requires that it be named in the tariffs under which it participates, and also prescribes the methods to be followed "in matters of rate divisions, interline billing, claim settlements and in all . . . relations with shippers and consignees." While membership in traffic organizations, largely composed of steam carriers, is not legally obligatory, it is a practical necessity, and is customary in the case of electric interurbans engaged in the general transportation of freight. (See *Michigan R. R. Co.* v. *P. M. R. R. Co.*, 74 I. C. C., 496, 497, 498).

(6) While the opinion states, "The proposed extensions would not alter the character of petitioner's business.

There would be the same local service in the transportation of passengers and freight since the railway would connect with street railways of the cities en route"; yet it is urged:

> "At the same time the interchange of freight business with steam railroads would be greatly increased. Indeed if the road should be completed so as to form a continuous interstate line in North and South Carolina, it would constitute the interior connecting link in a new joint through route and in effect, a new trunk line will be formed in addition to those now provided by the systems of the Southern, the Seaboard and the Atlantic Coast Line; for the Piedmont and Northern would then connect with the Georgia and Florida at Greenwood, South Carolina, on the south, and with the Norfolk & Western at Winston-Salem, North Carolina, on the north. Numerous new connections with steam roads would then be made and many new points in distant sections of the country would become accessible; and the railway would become to an increased extent an integral part of the great interstate railway system of the country."(R. 237,238)

(a) It cannot be a ground of objection that the road as completed would "form a continuous *interstate* line in North and South Carolina," or that it "would become to an increased extent an integral part of the great *interstate* railway system of the country." Congress has no control, and can confer upon the Commission no authority, over any interurban electric railway, except one which does "form a continuous interstate line," or whose operations include or directly affect interstate commerce. (See *Texas & N. O. R. Co.* v. *Northside Belt R. Co.,* 236 U. S., 475, 72 L. ed. 661). For purely local or intrastate construction and operation no exemption is needed.

(b) Neither can it be urged as a valid objection that the road as completed would constitute a connecting link, interior or otherwise, in a new joint through route; or that the interchange of freight business with steam railroads

would be greatly increased, and the new connections make accessible to freight originating on petitioner's lines many new points in distant sections of the country. The provisions of the Interstate Commerce Act, as amended by the Transportation Act, 1920, governing the operations of interurban electric railways permit them to increase and expand their freight business by forming connections and interchanging freight with steam railroads, and participating with them in joint through routes. Of course, this applies to the interchange of interstate freight and to joint through routes of interstate movements, thereby necessarily making accessible to interurban electric railways, points in distant sections of the country reached by the lines of their connections. Furthermore should the road be completed matters of the through routes in which it may participate, and of divisions of joint rates between it and its connections, would, under Sec. 15, paras. (1, 3 and 6), and other provisions of the Act, be subject to the regulation and control of the Commission.

(c) It is admitted that "the proposed extensions would not alter the character of petitioner's business"; that while the bridge traffic would be somewhat increased from the present proportion of approximately 2% of petitioner's total business (R. 142), "the proportion of bridge traffic (as) estimated (for the completed road) shows that it would still be of minor importance as compared with the traffic which originates on or is destined to points on the railway. The opposite is true of the Southern Railway in the Piedmont district." (R. 238)

II

Under the Transportation Act, 1920, An Interurban Electric Railway may Engage, as An Interstate Carrier, in the General Transportation of Freight, and Draw From This Source the Principal Part of its Operating Revenues, and May Interchange Freight and Participate in Through Routes With Steam Carriers Without Forfeiting the Exemption Which the Act Confers on Such Railways.

In *United States* v. *Village of Hubbard,* 266 U. S. 474, 69 L. ed. 389, it is said:

"The development of interurban roads became general about 1902. The authority to regulate them has been consistently exercised by the Commission in many cases and for many purposes. Since 1915, interurban electric roads have been required to file with it annual reports of their finances and operations. Jurisdiction over Urban Electric Lines, 33 Inters. Com. Rep. 536. In exercising authority over their passenger fares, *no distinction has been made between those interurban roads which were engaged in the general transportation of freight* in addition to their passenger or express business and those which were not. *On the other hand, the distinction* suggested in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission,* 230 U. S. 324, 337, 57 L. ed. 1501, 1506, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. Rep. 890, *between interurban railroads and urban or suburban street railways, has been carefully observed.* . . . . .

"The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of Congress, which, in recent amendments of the Act to Regulate Commerce, limited, in respect to certain subjects, the authority over them. The Commission entertained, in 1908, applications of interurban electric railroads to establish for freight through routes and joint rates with steam railroads. The Act of June 18, 1910, chap. 309, 36 Stat. at L. 539, 551, 552, Comp. Stat. para. 8583, 4 Fed. Stat. Anno. 2d ed. p. 469, provided that "the Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in . . . transporting freight in addition to their passenger and express business and railroads of a different character." Transportation Act, February 28, 1920, chap. 91, 41 Stat. at L. 456, Comp. Stat. para. 10,071¼, Fed. Stat. Anno. Supp. 1920, p. 72, enlarged, in several respects, the powers of the Commission, and dealt also

> in other ways with carriers engaged in interstate commerce. In doing so, it provided expressly, in five sections, *for the exclusion of certain electric railways* from the operation of the powers conferred; and *it also differentiated interurban electric railways* from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case. These provisions indicate that Congress did not intend to deny to the Commission the power to regulate interurban railways in other respects."

The provision of the Act of June 18, 1910, was brought forward, and with immaterial changes re-enacted as Sec. 15, para. 3, of the Transportation Act so as to read as follows:

> "The commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character."

Sec. 402 amending Sec. 1 of the Act to Regulate Commerce, and providing for the issuance of certificates of public convenience and necessity for the construction, extension or abandonment of lines, and conferring upon the Commission the authority to issue such certificates, by paragraph (22), excludes from the authority so conferred—

> "street, suburban, (and) or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Sec. 439 which inserts the new Sec. 20a of the Interstate Commerce Act, as amended by the Transportation Act, concerning the issue of securities, excludes by paragraph one—

"a street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation."

Sec. 300 dealing with the Railroad Labor Board, excludes by paragraph one—

"a street, interurban or suburban electric railway not operating as part of a general steam railroad system of transportation."

Sec. 204 relating to reimbursement of deficits of carriers incurred during Federal control, by paragraph (a) excludes—

"any street or interurban electric railway which has as its principal source of operating revenue, urban, suburban or interurban traffic, or sale of power, heat and light, or both."

Sec. 209 concerning the guaranty to carriers after the termination of Federal Control, excludes by paragraph (a)—

"a street or interurban electric railway not under Federal control on February 29, 1920, which has as its principal sources of operating revenue urban, suburban or interurban passenger traffic, or sale of power, heat and light, or both."

Sec. 422, introducing the new Sec. 15a dealing with the determination of a fair return, etc., excludes in paragraph one—

"(b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation, *or engaged in the general transportation of freight.*"

(1) The word used was *"general"*—the general transportation of freight; the interurbans regulated were *interstate.* Congress therefore intended to regulate "interurban electric railways" as (or certainly including those

engaged as), carriers of interstate freight, and as such to include them within the scope of the term in question, when not otherwise limited.

(2) Paragraph (3) Sec. 15 of the Interstate Commerce Act permits interurban electric railways to increase and expand their business in the general transportation of interstate freight by forming connections with steam carriers and participating with them in through routes and joint rates.

(3) Sec. 204 of the Transportation Act necessarily included within its provisions only those interurban electric railways, which, during any part of the period of Federal control, had as the principal source of their operating revenue freight traffic; and the same is true of Sec. 209 unless the interurban was under Federal control on February 29, 1920.

(4) Congress limited the exclusion of interurban electric railways from the sections of the Transportation Act dealing with the Labor Board, the issuance of railroad securities and certificates of public convenience and necessity, so as to except from exclusion and leave within the authority conferred by these sections *only those operated as a part of a general steam railroad system of transportation.*

In Sec. 15a dealing with the determination of a fair return, Congress attached to the exception used, in the sections just referred to, the additional limitation or exception "or engaged in the general transportation of freight," thus keeping within the provisions of Section 15a not only those operated as a part of a general steam railroad system of transportation, but also those engaged in the general transportation of freight.

Obviously Congress understood that unless the exclusion language of Sec. 15a was thus additionally limited

it would exclude interurbans engaged in the general transportation of freight; otherwise the additional limitation is meaningless.

It is equally obvious that Congress intended that the fact of an interurban electric railway being engaged in the general transportation of freight should not bring it under the authority of the Commission conferred by paragraph (18) of Sec. 1; otherwise it would have attached to the language of paragraph (22) excluding interurban electric railways the same exceptions or limitations which were attached to the same language of exclusion in Sec. 15a.

(5) If Congress thought it was necessary to incorporate in the exception in Sec. 15a interurbans engaged in the general transportation of freight, so as to keep them within the provisions of that section, and obviously it did think it necessary, then the failure to include such interurbans in the exception in paragraph (22) shows that Congress did not intend that interurban electric railways engaged in the general transportation of freight should be within the power given the Commission over new construction; but intended that they should be within the exemption given by that paragraph.

(6) Congress employed the terms, provisions and limitations contained in the Transportation Act, 1920, with an intelligent understanding of their meaning. In construing the Act all the provisions and limitations contained therein must, if possible, be given a meaning. The same terms and limitations, when used in different parts of the Act, must be given the same meaning, unless a contrary intention appears. *When a given term is used with a given limitation in one part of the Act and the same term is used without this limitation or with a different limitation in another part of the Act, it must be given effect in the latter*

part free of the omitted limitaion, or as differently limited.

(7) Surely when the same term is used in one part of the Act with two limitations and in another part with only one of these limitations, it must be given effect in the latter part subject to the one limitation only, and not also subject to the omitted limitation.

The foregoing statements are, we think, sustained by the *opinion* in *United States* v. *Village of Hubbard,* 266 U. S. 474, 69 L. ed. 389, and by the footnotes to the opinion, giving the history of development of interurban electric railways and the regulation of them by Congress and the Commission.

The decision of the United States Labor Board in the case of *Brotherhood Locomotive Engineers, et al.* v. *Spokane & Eastern Ry. & Power Co., et al,* Decision No. 33 (Docket 26-a), decided December 11, 1920, is directly in point for the exception of interurban electric railways from the authority given the Labor Board by Sec. 300 of the Transportation Act, is in the same terms as the exception in paragraph (22) of Sec. 1. The Board held that the Piedmont and Northern came within the exception and was excluded from the authority of the Board upon the same grounds as are urged by the Piedmont and Northern in this case against the assumption of authority by the Interstate Commerce Commission under paragraph (18) of Section 1. The decision of the Labor Board, while lacking the authority of a precedent, is nevertheless entitled to the weight which the soundness of its reasoning gives it. We submit that it is well reasoned and sound, and respectfully request that it be read in connection herewith.

It was rendered only a few months after the enactment of the Transportation Act, (February 28th), 1920, while the events which led up to and attended the passage of the

Act were presumably still fresh in the minds of the members of the Labor Board.

The construction placed by the Interstate Commerce Commission upon the language contained in the exception in paragraph (22) of Sec. 1 and in Sec. 20a of the Act, was at first the same as the construction which the Labor Board gave to the same language. As stated in the opinion below (R. 249, 250):

> "On October 12, 1920, the Commission ruled that it did not have jurisdiction over the Piedmont and Northern in regard to the issuance of securities because the road was covered by the exception in Section 20a. This ruling, however, was ex parte and no opinion seems to have been filed. The application of Michigan United States Railways Company, 67 I. C. C. 452, for a certificate of public convenience and necessity, was considered on April 21, 1921. The railroad serves cities in Michigan and adjacent territory and has a physical connection for interchange of business with the Pere Marquette Railway. The Commission's memorandum of 1917 shows that it is 404.16 miles in length and that its passenger revenues were $3,402,002.27, and freight revenues, $392,-633.58 in that year. It was decided that the railroad was covered by the exception in Paragraph 22 of Section 1 of the Act."

The Commission, however, soon departed from these rulings, and in 1922 in Sacramento Northern Ry., 71 I. C. C., 653, 79 I. C. C., 782, and again on February 14, 1927, (shortly before the letter of March 8, 1927, to petitioner), in Ex Parte No. 38, 122 I. C. C., 414, adopted and adhered to the construction which was accepted by the court below, and made the basis of its decision.

We are relieved of the task of discussing the reasoning of the Commission in these cases, separately from the discussion of the reasoning of the court below, because the court below adopted, with elaboration and amplification

the reasoning of the Commission, and our effort to overcome and answer the reasoning of the court is also an effort to overcome and answer the reasoning of the Commission; except that we should point out that in neither of the cases just referred to was the scope of the term "interurban electric railways" as used by Congress in the Transportation Act, 1920, directly and necessarily involved, and what the Commission said on this subject in each of the cases was not really necessary to the decision. In the Sacramento Northern case the Commission found that the electric road was operated as a part of a general steam railroad system of transportation, and this finding, of course, was sufficient to control and determine the decision.

In Ex Parte, 38, 122 I. C. C., 414, the point here involved was not presented, because the Boiler Inspection Act, as amended by the Act of June 7, 1924, (36 Stat. L., 913; 43 Stat. L., 659), the construction of which was involved in that case, leaves out the word "steam." In Sec. 1 of that Act the term "common carrier" is defined so as to exclude street, suburban and interurban electric railways "unless operated as a part of a general railroad system of transportation."

The three things which seem to have influenced and controlled the ruling of the Commission in assuming authority over the proposed extensions and the decision of the court in sustaining the ruling of the Commission were: (1) the word "interurban" which the court interpreted as intended to designate a carrier "engaged in the local carriage of passengers and freight as its primary business" (R. 246); (2) the fact that petitioner's operating revenues are very largely drawn from interstate freight traffic, with the result, as the court held, "that it has crossed the line between an interurban railroad engaged in the general transportation of freight, and a general carrier subject to

the provisions of the statute" (R. 247); and (3) petitioner's ability "to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent." (R. 252).

III

The Court Below Erred in Interpreting the Word "Interurban" as Intended to Limit the Scope of the Words "Interurban Electric Railways" to a Class of Carriers Which are Primarily Engaged in the Local Carriage of Passengers and Freight, and Whose Interstate Operations are, by the Hypothesis of the Classification, Necessarily Restricted and Limited in Extent.

The Court said:

> "Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, *and should be engaged in the local carriage of passengers and freight, as its primary business*, the extension of its line would remain a matter of local concern and should be left to the regulation of local authorities."

Again:

> "Freight traffic may be *limited in extent* and within the scope of a carrier devoted primarily to local business, and at the same time, be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail and express, and yet be so *restricted in its operations* that it may not be properly classified with general steam carriers whose operations cover a wide field." (R. 246).

By definition of the word "interurban" the court below thus introduced into paragraph (22) of Section 1 limitations and restrictions upon the exemption of "interurban electric railways" in addition to the limitation expressly stated in the exception in that paragraph.

It may be conceded that the words do include within their scope electric railways which are primarily engaged

in the local carriage of passengers and freight, and whose interstate operations are restricted and limited in extent; but taken by themselves, without other limiting language, their scope cannot be thus confined.

The very limitations, which Congress attached to the words in other parts of the Act when it did intend to limit their scope, indicate that when used, without such limitations, Congress did not intend that their scope should be limited and restricted as declared by the court below.

The history of the provisions of the Transportation Act, 1920, and of Acts of Congress prior thereto dealing with interurban electric railways, the rulings of the Commission, and decisions of the courts, under the original Act to Regulate Commerce, the amendment of June 18, 1910, and other Acts of Congress interpreting the words "common carrier by railroads" to include interurban but not street and suburban electric railways, (*see U. S. v. Village of Hubbard, 266* U. S. 474), make it manifest that it had been repeatedly brought to the attention of Congress that there were many electric railways, commonly described and designated as interurbans, whose operations in interstate commerce were no less restricted or limited in extent than those of many steam carriers. The Act of June 18, 1910, Chap. 309, 36 Stat. 539, 551, 552, as already noted, authorized and permitted electric railways when "engaged in the general business of transporting freight" to widen their operations in interstate commerce and to expand the extent and increase the volume of their interstate freight traffic through interchange with steam carriers and the participation with them in joint through routes.

"Interurban electric railways . . . engaged in the general transportation of freight" were included under Sec. 15a of the Interstate Commerce Act, as amended by the Transportation Act, 1920, among the carriers put "under the fostering guardianship and control of the Commis-

sion," and for whom provisions were made to enable them "to maintain an adequate railway system for the people of the United States," (See *R. R. Com.* v. *Chicago B. & Q. R. Co.*, 257 U. S., 563, 585; *R. R. Com.* v. *Southern P. Co.*, 264 U. S., 331, 341), instead of being excluded along with carriers whose operations are restricted or limited in extent or service, such as sleeping-car companies, express companies, and independently operated interurban electric railways *not* engaged in the *general* transportation of freight.

On August 29, 1916, Congress incorporated in the Army Appropriation Act the provision known as the Federal Possession and Control Act, (39 Stat. L., 645):

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The Federal Control Act, 40 Stat. L., 451, of March 21, 1918, provided in the seventh paragraph of Sec. 1:

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control,' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: Provided, however, That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal

> source of operating revenue urban, suburban or interurban passenger traffic, or sale of power, heat and light, or both."

Congress here recognized that interurban electric railways competed for traffic with steam railroads; that they connected with such railroads and engaged as common carriers in general transportation, and that some, at least, of them had freight as the principal source of their operating revenue.

The possession and control of petitioner's railway was taken over under the Federal Control Act, and it is apparent that it was taken over as an interurban electric railway which had as the principal source of its operating revenue freight traffic, because as heretofore stated the Director General in reporting to Congress on October 1, 1919, (See letter from Walker D. Hines, Director General, to Hon. John J. Esch, Chairman House Committee, on Interstate and Foreign Commerce, U. S. House Hearings, Vol. 15, p. 2796), the properties in Federal control as of January 1, 1919, included petitioner's railway in the list entitled, "Electric Lines Operated."

When the Transportation Act, 1920, was enacted the word "interurban" had never been used in any prior Act of Congress, ruling of the Commission, or decision of the courts, to designate a road whose operations were necessarily limited in extent and primarily local as compared with steam railroads. "On the other hand, the distinction suggested in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, 337 . . . between interurban railroads and urban or suburban street railways (had) has been carefully observed. . . . In exercising authority over their passenger fares, no distinction (had) has been made between those interurban roads which were engaged in the general transportation of freight in addition to their passenger and express business, and those

which were not." . . . (*United States* v. *Village of Hubbard*, 266 U. S. 474, 477, 478).

When Congress made the authority of the Commission under paragraph (22) of Sec. 1 and Sec. 20a, and of the Labor Board under Sec. 300 of Title 3, to depend upon whether such railways were orperated as parts of a general steam railroad system of transportation, it adopted the nomenclature commonly applied to electric railways, and followed the distinction between steam railroads and electric railways which had theretofore been repeatedly recognized and applied in the rulings of the Commission, the decisions of the courts, and prior acts of Congress.

In 58 I. C. C., 455, under the title "Electric Railway Mail Pay," the Commission in applying the Act of Congress approved July 2, 1918, 40 Stat. at L., 748, directing the Commission to fix the compensation for the transportation of mail matter "by urban and interurban railway common carriers," adhered to the established grouping of electric railways, saying:

> *"There are three kinds or classes of electric lines,* each of which is employed to some extent in the carriage of the mails. They are known as urban or city lines, suburban lines and interurban lines. Urban lines comprise those operating wholly within city limits.***
>
> *"Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like the steam roads,* so far as mail transportation is concerned. Many of them do considerable freight and express business in addition to their passenger business."

The above case was submitted to the Commission on December 6, 1919, only a few months before the enactment of the Transportation Act, 1920, and was decided August 7, 1920, only a few months after its enactment.

Many other reports of the Commission of similar import and issued prior to the Transportation Act, 1920, are cited in the footnotes to the Village of Hubbard case. (266 U. S., 474, 478, 479). We shall refer to only a few of them.

In 1913 in *St. Louis, Springfield & Peoria Railroad* v. *P. & P. U. Ry. Co.*, 26 I. C. C., 226, (see also 41 I. C. C., 584; 42 I. C. C., 448), the Illinois Traction System was described "as lines of interurban electric railway." It operated about 425 miles of standard guage electric lines in Illinois, owned some 900 cars, of which 775 were freight cars, and had through routes and joint rates with steam roads to the west, northwest and southwest.

In *Chicago & M. Electric R. Co.* v. *Illinois C. R. Co.*, 13 I. C. C., 20, and in *Cedar Rapids & I. C. R. & L. Co.* v. *Chicago & N. W. R. Co.*, 13 I. C. C., 250, descriptions are given of "the interurban electric railroads" specifically mentioned in the Village of Hubbard case, showing that they were laid, the one with 80 pound and the other with 70 pound rail, were well ballasted, and built according to the standards of steam railroad construction. One of them then had in effect through routes and joint rates with a steam railroad, and in those proceedings the Commission established for both of them other through routes and joint rates for freight with steam railroads.

In 1912 in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, 337, it was held that street railroads were not within the purview of the Act to Regulate Commerce, February 4, 1887, Chap. 104, 20 Stat. 379, because they were not channels of interstate commerce, but were purely local, the court saying:

> "The railroads referred to in the Act were not those having separate, distinct and local street lines, but those of whom it was required that they should

make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

The foregoing distinction between railroads operating local lines and those whose lines connected with the lines of other carriers and were used for the movement of freight in interstate commerce was, as stated in the Village of Hubbard case, made the basis of the Commission's assumption of authority over the rates of interurban electric railways, thus clearly showing that the Commission assumed authority over this class of electric carriers because the class included "a new type of interurban railroad" which was required to "make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

In the Village of Hubbard case (266 U. S. 474, 477), it is stated that the development of interurban roads became general about 1902. The stage of their development in 1912 when the Omaha case was decided, is indicated by the following which the court was careful to add in that case:

> "But it is said that since 1887, when the Act was passed, *a new type of interurban railroad* has been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight."

The further development of electric railways at the end of the year 1917 is indicated by the Commission's Memorandum of electric railway companies reporting to it for

that calendar year. The Memorandum does not include "many of the largest street and electric railways in the United States . . . not considered subject to the Act to Regulate Commerce, because they are engaged only in intrastate business." It shows 267 operating companies, reporting an operated mileage of 15,981.91, and operating revenues of $183,516,437.32, and that of the 267 companies 42 were Class A companies, each having average annual operating revenues of more than one million dollars. Many of the companies reporting, then, had lines of considerably greater mileage than petitioner's railway would have after the construction of the proposed extensions, and operating revenues in excess of petitioner's.

Among the companies shown in the Memorandum was the Spokane & Inland Empire Railroad Company, whose operated mileage was given as 212.54 miles, and total operating revenues as $1,224,909.79, with $307,946.95 from freight, $20,075.74 from express, $11,151.69 from mail, and $817,626.89 from passenger traffic.

In 1915 in *Spokane & Inland Empire Railroad Co.* v. *United States,* 241 U. S. 344, 346, this company was described as operating, in addition to a street railway system in Spokane, Washington, "several interurban electric lines," one of which was interstate, extending from Spokane to Coeur d' Alene, Idaho, a distance of about 40 miles. The road was standard guage, with rails of standard weight. Its freight trains did not enter upon street railway tracks, but started from the company's yards and ran directly to Coeur d' Alene. "The street car business was entirely separate from that done by the interurban line, the employees of the one having nothing whatever to do with the other."

Transportation Act, 1920

The problems, which Congress was called upon to solve by the enactment of the Transportation Act, 1920, and the

conflicts between national and local authority, which the proposed solutions raised are a part of the history of the passage of the Act.

The treatment of electric railways with relation to the new railroad policy introduced by the Act dealing with group rate making and the determination of a fair return, labor disputes, certificates of public convenience and necessity, and the approval of securities, required that due consideration be given both to national and local interests, and also to the plight in which Congress found many electric railways at the termination of Federal control. National and local interests were affected differently by different types of electric railways, and provisions which were appropriate for the regulation of some of them and conducive to their normal and proper development and expansion in the interest of the public would be inappropriate if applied to other types of electric railways.

The local character of many electric railways made the class as a whole of minor importance, as compared with steam railroads of the country, in the proposed scheme of enlarged Federal regulation and control, and naturally lent support to the view that matters intimately connected with the service of electric railways, and their ability to maintain and enlarge their service, such as the construction and abandonment of lines and the issuance of securities, be left under the jurisdiction and control of local authorities instead of being vested in the central authority. (2)

On the other hand, there were many interurban electric railways which had been excluded from Federal control under the proviso contained in the seventh paragraph of Sec. 1 of the Federal Control Act of March 21, 1918,

(2) Memorandum concerning electric railway companies reporting to the Interstate Commerce Commission for calendar year, 1917; U. S. House Hearings before Committee on Interstate and Foreign Commerce, 1919, H. R. 4378, statements of Mr. Chas. E. Elmquist, President National Association of Railroad and Utilities Commissioners. (Vol. 2, p. 1613); and of American Electric Railway Association, (Vol. 3, p. 3418).

which required the exclusion of all interurban electric railways, the major part of whose revenues was from traffic other than freight traffic. Under this provision of the Federal Control Act the Railroad Administration had excluded all electric railways the principal part of whose revenues came from the sources described in the proviso, without regard to the extent of their participation in freight traffic or their capacity to participate in it.(3) When the American Railway Express Company was formed by the Railroad Administration it had diverted business from interurban electric lines not under Federal control to Federal controlled lines, notwithstanding the fact that prior to Federal control many electric railways had handled express under contracts with the express companies and had received substantial revenues from this source. (Proceedings of the Federal Electric Railways Commission, held in Washington, D. C. during the months of July, August, September and October, 1919. Vol. 1, pp. 705, 728.) The result had been that many interurban electric railways which had been excluded from Federal control had suffered large losses of revenues, or their officials had been constantly apprehensive of losses, because they had been denied, or apprehensive that they would be denied, participation with Federal controlled lines in through joint rates; notwithstanding the fact that their construction and equipment were such as to enable them to participate in such routes and to interchange freight with steam carriers, and notwithstanding the further fact that prior to Federal control they had in many cases so participated and interchanged freight, as provided by the Act of June 18, 1910, (Chap. 309, 36 Stat. 539, 552), and the rulings of the Commission made under the authority of the Act, and

(3) U. S. House Hearings before Committee on Interstate and Foreign Commerce, 1919, H. R. 4378, Mr. Sanford Ladd, representing Michigan Railroad Company and Michigan Railway Company, (Vol. 2, p. 1933); See also 67 I. C. C., p. 452, in which the Interstate Commerce Commission ruled on April 21, 1921, that the electric railway described by Mr. Ladd was within the exemption given by Paragraph (22) of Section 1; statement of Mr. J. D. Cornell, (Vol. 2, p. 1947).

in fact even before the Act. These roads were general carriers of interstate freight, and were so constructed and equipped as to enable them to participate in through routes and to interchange freight with steam carriers. (4) Their functions were in many respects similar to the functions of many steam railroads, and their freight revenues were below their passenger revenues only because they had been deprived of the opportunity to engage in freight business to the extent that they were capable of engaging in it, and not because of inferior construction and equipment, inefficiency of organization, or other incapacity for such service. The plight and condition of these roads and their capacity to handle traffic made it advisable that they be embraced within the protective provisions of the Act, designed to assure to the carriers of the country a fair return upon their property value, and to foster and strengthen the national transportation system, principally those provisions incorporated in Sec. 15a of the Interstate Commerce Act, as finally amended by the Transportation Act, 1920.

The different angles from which the regulation and control of electric railways had to be considered forcefully brought to the attention of Congress that there were various kinds of interurban electric railways, rendering various kinds and classes of service, some engaged principally in the carriage of passengers, with limited freight facilities, others engaged as general carriers of interstate freight, performing in a large measure functions similar to those performed by many steam roads, some of them drawing the major part of their operating revenues from freight traffic, while still others were operated as parts of

(4) Commission's memorandum referred to in Note (2); also citations in Note (3). That interurban electric railways were engaged in the general transportation of freight and performed many of the functions of steam railroads and competed with steam railroads, was brought to the attention of Congress in 1910 when the Act of June 18, 1910, relating to the establishment of through routes, etc., between electric railways and railroads of a different character was before the House Committee on Interstate and Foreign Commerce; statement Mr. J. C. Lincoln, (Vol. 7, pp. 463, 464, U. S. House Hearings 1910); statement Mr. Lewis S. Cass, (Vol. 18, p. 1027, U. S. House Hearings, 1910).

a general steam railroad system of transportation. Certainly the conditions which prevailed brought it to the attention of Congress, and this is the point we wish particularly to emphasize, that there were interurban electric railways, which were engaged in the general transportation of interstate freight, and that the operations of many of them were no less restricted or limited in extent than the operations of many steam carriers.

With these conditions before it Congress, in enlarging the powers of the Commission by the amendments introduced by the Transportation Act, "provided expressly, in five sections, for the exclusion of *certain electric railways* from the operation of the powers conferred; and it also differentiated interurban electric railways from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case," to-wit, in the new section 15a dealing with the determination of a fair return. (See *United States* v. *Village of Hubbard,* 266 U. S. 474, 479,480, and footnote 7.)

It met the need for remedial relief of those interurbans which had suffered by reason of exclusion from Federal control by including them within the authority given to the Commission by Sec. 15a, thus giving them the assurance of a fair return which that section held out to carriers, and entitling them to the other benefits and imposing upon them the obligations of the provisions of that section, which were designed "to provide the people of the United States with adequate transportation," clearly treating and providing for them as general carriers of interstate commerce and as important factors, either actual or potential, in the "great interstate railway system of the country."

It met the need that electric railways be left free to extend and expand their service under the jurisdiction and control of local authorities by excluding them from the

powers given the Commission over the construction and abandonment of lines and the issuance of new securities, with one exception. Congress was unwilling that the Commission's authority should be divided with local authorities where an electric railway was operated as a part of a general steam railroad system of transportation, because such a division would put those parts of the system operated by steam under the authority of the Commission and leave the electrically operated parts under the local authorities; but no such objection existed in the case of an interurban electric railway not operated as a part of a general steam railroad system of transportation, even though engaged in the general transportation of freight.

IV

If Petitioner's Railway is Within the Scope of the Words in Question its Ability "To Commit the Mischiefs of Uncontrolled Expansion Which the Act Was Designed to Prevent" Furnishes no Valid Reason for Denying to Petitioner the Exemption Which it Claims.

We respectfully submit that notwithstanding the able and painstaking consideration which was given the case below, the court failed to give effect to the statutory test of the right to the exemption in question. It said of petitioner, and this appears to be the real basis of the decision, that "even if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so simliar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent."

The exemption of interurban electric railways by paragraph (22) was made only because, unless exempted, those which were engaged in interstate commerce would have come within the reason and policy underlying the provis-

ions of paragraphs (18) to (21) of Sec. 1 of the Act. Petitioner's claim of exemption is based on the words of the statute as finally enacted.

The claim of exemption cannot be met and denied by an argument intended to show that the line of demarcation as drawn by Congress was not drawn in accord with "the rule of reason"; that it did not accurately follow and mark the bounds of the policy underlying the provisions in question. Statutory lines of demarcation seldom do, and hardly ever do, when they are drawn as a compromise of ideas and interests. The field of the Federal power to regulate interstate commerce is an historical field of compromise between national and local authority. Congress in the Transportation Act, 1920, did not occupy the full field of its competency; it exempted and left to local authorities territory which might have been occupied. The line of demarcation which Congress drew in fixing the Commission's authority over the construction and abandonment of interurban electric railways, left within this exempted territory those interurban electric railways not operated as a part of a general steam railroad system of transportation. The fact that now and then, or even frequently, one of them left within the exempted territory may increase and expand its business so as to exhibit an ability "to commit the mischiefs of uncontrolled expansion," and threaten the integrity of the railroad policy introduced by the Transportation Act, 1920, affords no justification for the obliteration of the line of demarcation as fixed in the statute. On the contrary, it calls for a rigid application of the principle that as the law is written so must it be applied.

"It is not for the court to say, where the language of the statute is clear, that it shall be so constructed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions." (*Dunn* v. *Reid*, 10 Pet. 524.)

If the exemption be an unwise one, or not wisely limited and restricted, the remedy lies with Congress. Congress has the power to take it away entirely, and certainly has the power to attach to it such further limitations and exceptions as it may deem wise.

V

The Decree Below Denying Petitioner the Exemption Claimed Under Paragraph 22 of Section 1 of the Interstate Commerce Act, as Amended by Transportation Act, 1920, Cannot be Sustained Under the Principle and Rules of Interpretation Approved in Texas & P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266.

Texas & P. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266, involved the right of the Santa Fe to construct and operate certain steam railroad mileage without first obtaining from the Commission a certificate of public convenience and necessity, and the question presented was whether the mileage was an extension within the authority conferred on the Commission by Paragraph (18), or an industrial track within the exemption of such tracks when located wholly within one state given by Paragraph (22).

The court, as we construe the opinion, did not hold that rulings of the Commission and decisions of the courts, and certainly did not hold that prior Acts of Congress dealing with the same subject, are no guide to the meaning of the terms in the Transportation Act, 1920. It said:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs (18) to (22) is furnished by the context and by the relation of the specific provisions here in question to the railroad policy manifested by Transportation Act, 1920."

Petitioner relies upon the principles announced in this opinion.

The context of Sec. 15a is a true guide to the meaning of the words "interurban electric railways . . . engaged in the general transportation of freight," used in the exception in that section, and if all other guides should be disregarded, it alone leads to the conclusion that Congress intended to include electric railways such as petitioner's within the meaning of those words; and also leads to the further conclusion that inasmuch as such railways were covered by the exception in that section and were not covered by the exception in paragraph (22), Congress intended them to be included under the exemption given by that paragraph to "interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."

It is only necessary to apply to the context of Sec. 15a the rule expressed in the maxim, noscitur a sociis, to be convinced both by process of inclusion and exclusion that the court below was in error in holding that Congress intended by the words in question to designate and describe an electric carrier "engaged in the local carriage of passengers and freight as its primary business," which was "restricted in its operations," and whose "freight traffic (was) limited in extent." (R. 246.)

Interurban electric railways engaged in the general transportation of freight, we must repeat, were included under Sec. 15a among the carriers which Congress put "under the fostering guardianship and control of the Commission," and for whom it made provisions designed to enable them "to maintain an adequate railway service for the people of the United States."

They were dissociated from interurban electric railways not operated as a part of a general steam railroad system of transportation not engaged in the general transportation of freight, from street or suburban electric railways unless operated as a part of a general steam railroad

system of transportation, from sleeping-car companies and express companies, all of which may be described as special or limited carriers whose operations are restricted or whose service is limited in extent, and all of which were excluded from the provisions of Sec. 15a by the definition of the term "carrier" contained in paragraph (1) of that section.

The fact that the Act reveals a different policy in relation to electric railway mileage from that revealed in relation to steam railroad mileage, must also be borne in mind.

Exemption from Federal authority is the policy in relation to the construction of interurban electric railways and the general rule of the provisions dealing with their construction, and inclusion under Federal authority the exception. On the other hand, in relation to the construction of steam railroad mileage inclusion under Federal authority is the policy of the Act and the general rule of the provisions dealing with the construction of such mileage, and exemption the exception. All steam railroad mileage is within the authority conferred on the Commission by paragraph (18), except as specifically excepted by paragraph (22); whereas all interurban electric railways are exempt from the authority conferred with the specific exception of those operated as a part of a general steam railroad system of transportation. With this one exception the exemption of interurban electric railways is as broad as the authority conferred.

Most railway systems operated exclusively by electricity were at the time of the passage of the Transportation Act, 1920, and still are, small as compared with those operated exclusively by steam, or partly by steam and partly by electricity. There were, of course, at the time of the passage of the Act small steam railroads whose operations affected interstate commerce much less than some of the

larger interurban electric railway systems; but the policy of Congress in relation to each of the two classes of railways was not determined by extremes in either class. Exemption was not given to small steam railroads, nor denied to large interurban electric railways.

The policy which controlled Congress in the passage of the Act must, of course, control in its interpretation and construction. A little steam railroad could not successfully contend that because it was little, and its construction and operation would have little effect on interstate commerce, it should be treated as an interurban electric railway and given exemption from the authority conferred on the Commission over the construction of steam railroads. The contrary is equally true, and a large interurban electric railway cannot be treated as a steam railroad and denied exemption merely because it is large and its construction and operation may materially affect interstate commerce.

The court below said:

> "The difference in language between the exception in Section 15a and the exception in Section 1, Paragraph 22, may not be ignored, but it is accounted for by the fact that in one case Congress was dealing with rates, and in the other, with the construction of new lines. It evidently concluded that if an electric interurban road should build up a business of transporting property to such an extent as to be engaged in the general transportation of freight, it should be included in the general rate adjustment provided in Section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be engaged in the local carriage of passengers and freight, as its primary business, the extension of its lines would remain a matter of local concern and

should be left to the regulation of local authority." (R. 246.)

We submit that the definition or conception of an interurban electric railway engaged in the general transportation of freight, which controlled the court below, and its failure to give effect to the difference in language between the exception in Sec. 15a and the exception in Sec. 1 paragraph (22), were largely due to a misapprehension of the scope and purpose of Sec. 15a of the Act. It was not necessary for Congress to put interurban electric railways engaged in the general transportation of freight under Sec. 15a in order to give the Commission authority over their rates and over connections between them and steam railroads. The authority of the Commission to regulate rates and connections between carriers was not conferred by Sec. 15a, but by Sec. 15 and other provisions of the Act. The Commission had exercised this authority over interurban electric railways for years before the provisions of Sec. 15a were introduced into the Act by the Transportation Act, 1920, and in its exercise had made no distinction between interurban railroads engaged in the general transportation of freight and those which were not. (See *U. S.* v. *Village of Hubbard*, 266 U. S. 474, 477.)

Section 15a deals primarily with other matters to which we have already referred, and its vital relation to the new policy of enlarged Federal control of interstate carriers introduced by the Transportation Act, 1920, is made manifest in the following statement from *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 478:

> "The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the

railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

Interurban electric railways engaged in the general transportation of freight would not have been included under that section if Congress had intended that the scope of those words should include only electric carriers which are primarily engaged in the local carriage of passengers and freight and whose interstate operations are necessarily restricted and limited in extent. Undoubtedly if Congress had intended that the scope of the words should be so limited, they would have been of too little consequence to be included in this vital part of the enlarged scheme.

VI

The Court Below Erred in Assuming That "Interurban Electric Railways" Within the Scope of Those Words in the Transportation Act, 1920, Are Not General Carriers; And in Holding That Petitioner's General Freight Business "Has Become So Great That It Has Crossed the Line Between an Interurban Railroad, Engaged in the General Transportation of Freight, and a General Carrier Subject to the Provisions of the Statute."

The court said:

"It is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont and

> Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn there can be no doubt that a railroad, 92% of whose traffic comes from the general transportation of freight, and 95% of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad." (R. 246, 247.)

(1) The court, as we have undertaken to show, was in error in assuming that interurban electric railways engaged in the general transportation of freight, within the scope of those words in the Transportation Act, 1920, are not general carriers of interstate commerce. Moreover petitioner's railway is subject to all the provisions of the Act applicable to a "common carrier by railroad," except as interurban electric railways of its type are excluded or exempted from certain of the provisions of the Act.

(2) Neither freight business nor engaging in interstate commerce and carriage is a distinctive service of "a general steam railroad" any more than passenger business or engaging in local commerce and carriage is a distinctive service of an interurban electric railway. Either type, if a general carrier, must handle both kinds of business in either local or interstate commerce.

What we submit is the fallacy in the foregoing statement of the court may be illustrated if we take two interurban electric railways exactly similar in every respect, both having at the start annual passenger revenues of three million dollars and annual freight revenues of two million dollars; one loses by far the greater part of its passenger business, due to circumstances beyond its control, the other retains its entire business of both kinds. Surely the first one does not with the loss of its passenger business also lose its right to the exemption which the Act gives to interurban electric railways. Certainly it has not

become a more potent factor in railroad transportation or a more formidable competitor of steam railroads.

The illustration of the railway, which lost its passenger business, is applicable to petitioner's railway. Its annual revenues for the years 1913 to 1926, inclusive, are given at page 208 of the record. In 1918 its passenger revenues exceeded its freight revenues by approximately $150,000. Since then there has been a gradual decrease in its passenger revenues and a more pronounced increase in its freight revenues. This is accounted for by the increased use of private automobiles and motor busses over the improved roads which in recent years have been constructed throughout the territory in question, and to the increased demand for freight service which has existed in the same territory during the same period. (R. 140.) There has been no change in the essential character of petitioner's railway, or in the manner of its service, or its methods of operation. It still does all the passenger business it can get, and handles it in the same manner in which it handled it in 1918, and would continue to handle it in this manner after the construction of the extensions. The only effect that the construction of the extensions would have on petitioner's passenger business would be that the longer milegae afforded would probably enable it to regain some of the lost business. (R. 142.)

Petitioner now handles its freight business in the same manner in which it handled it in 1918, and would continue to handle it in the same manner after the construction of the extensions. In 1918 it operated over city streets, used the street railway systems to pick up and disdistribute freight within the cities, and gathered up and delivered freight and performed a switching service all along its lines, as it still does and would continue to do after the construction of the extensions. The only effect which the construction of the extensions would have on

petitioner's freight business would be that they would afford petitioner a few additional connections with steam railroads and increase its operated mileage.

In the beginning, at least, and at the time of the passage of the Transportation Act, 1920, petitioner was an interurban electric railway. The gravamen of the opinion is that by merely exercising with efficiency and success the privileges which under the Act it was free to exercise it has outgrown its original character and must now "be placed in the same category as a general steam railroad," a proposition, we submit, at variance with the provisions of the Act prescribing the functions electric railways may perform and the traffic arrangements they may make.

(3) The decision leaves the status of electric railways, certainly that of many of them, obscure and uncertain, and furnishes no rule of conduct for the guidance of those engaged in the operation of such railways, or for the guidance of either national or state authorities whereby each may determine the limits and extent of their respective jurisdiction and authority to regulate and control electric railways. The opinion does not indicate, with any degree of definiteness, when an electric railway "has crossed the line between an interurban railroad and a general carrier." The mere fact of engaging in the general transportation of freight, drawing the major part of its operating revenues from freight traffic, making through traffic arrangements with steam railroads and thereby increasing its freight business, does not carry it across the line, because the decision recognizes that it may do all of these things. (R. 245.)

Under paragraph (20) of Sec. 1, if not exempt by paragraph (22), "any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the

provisions of this paragraph, or of paragraph (18) of this section, shall upon conviction thereof be punished by fine of not more than $5000 or by imprisonment of not more than three years, or both."

Sec. 20a dealing with the issuance of securities, the interlocking of officers and directors of carriers, etc. contains the same exemption as paragraph (22) of Sec. 1; and by paragraph (11) imposes even more severe penalties and liabilities for violations of its provisions by a carrier, not exempt, its officers, directors, attorneys and agents, than those imposed by paragraph (20) of Sec. 1.

If the officers, directors, attorneys and agents of an electric railway, which does any of the things covered by these provisions of the Act, fail to solve correctly the "obviously difficult" question, "when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute," they, as well as the carrier they represent, incur the penalties and liabilities imposed by the foregoing provisions of the Act.

VII

The Fact That Congress in the Railway Labor Act of May 20, 1926, (44 Stat. 577), Reenacted and Brought Forward From Tittle III, Section 300, Paragraph (1), Transportation Act, 1920, The Words in Question Which Had Been Interpreted by the U. S. Labor Board to Include The Piedmont and Northern Within the Scope of Their Meaning, Gives Rise to a Strong Presumption That the Interpretation Was in Accord With the Original Intention With Which Congress Used the Words in the Transportation Act, 1920.

It is conceded that the decision of the Labor Board in *Brotherhood of Locomotive Engineers, et al,* v. *Spokane & Eastern Railway, et al,* Decision No. 33, (Docket 26-a,

December 11, 1920), "was directly in point for the exception of certain interurban electric railways from its control by Section 300 of the Transportation Act is in the same words as the exception in Paragraph (22) of Section 1. The Board held that the Piedmont and Northern and other carriers were excluded from its jurisdiction upon the same grounds as are urged by the petitioner in this case to support its argument," (R. 248, 249.)

The Railway Labor Act of May 20, 1926, was passed to take the place of Title III of the Tranportation Act, 1920, 41 Stat. 469, which dealt with "disputes between carriers and their employees and subordinate officials." (See Sec. 14 of the Railway Labor Act.)

It was introduced in Congress as House Bill 7180, and Paragraph (1) of Section 1 of the Bill in defining the carriers subject to its provisions followed exactly the language of Paragraph (1), Section 300, Title 3, of the Transportation Act, 1920, which was the language interpreted by the U. S. Labor Board in its Decision No. 33, except that the word "steam" was omitted, so that the paragraph read:

> "The term 'carrier' includes any express company, sleeping car company, and any carrier by railroad subject to the Interstate Commerce Act, except a street, interurban or suburban electric railway not operated as a part of a general railroad system of transportation."

The bill was referred to the House Committee on Interstate and Foreign Commerce and hearings on it were conducted during January and February, 1926. Objection was made to the omission of the word "steam" on the ground that "the matter of the jurisdiction of the present Railroad Labor Board over independently operated electric railways under the Transportation Act of 1920 was exhaustively considered under Docket 26-a of the Railroad Labor Board, and their decision with reference there-

to was announced in Decision 33 of December 11, 1920. This Decision definitely determined the status of independently operated electric railways of the United States and declared, in substance, that the present Railroad Labor Board had no jurisdiction over such independently operated electric railways. . . . There has, therefore, come into existence a generally accepted construction of the words 'operating as a part of a general steam railroad system of transportation,' and . . . . at this time there is no valid reason for modifying this langauge (by the omission of the word "steam"), in such a way as to require a further lengthy period of uncertainty caused by the lack of definite construction to be placed on the modified language as contained in House Bill 7180." (See U. S. House Hearings on H. R. 7170, pp. 24, 25.) The Bill was also referred to the Senate Committee on Interstate Commerce where the same objection was urged to the omission of the word "steam". (See U. S. Senate Hearings on S. 2306, pp. 120, 121.)

Subsequently to these hearings the definition of the term "carrier" was amended so as to incorporate in the exception the word "steam" and to follow without substantial change the language which had been interpreted by the U. S. Labor Board, so that Paragraph (1) of Section 1 as amended read:

> "First. The term 'carrier' includes any express company, sleeping car company and any carrier by railroad, subject to the Interstate Commerce Act, 'including all floating equipment, such as boats, barges, tugs, bridges and ferries; and other transportation facilities,' used by or operated in connection with any such carrier by railroad, and any receiver or any other individual or body, judicial or otherwise, when in the possession of the business of employers or carriers covered by this Act: Provided however, That the term 'carrier' shall not include any street, interurban,

> or suburban electric railway unless such a railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power."

Entirely apart from any inference to be drawn from the objection made before the Committees to the omission of the word "steam," and the reasons urged in support of this objection, it must be presumed that Congress was familiar with the Labor Board's interpretation of the words, and their incorporation in the subsequent Act gives rise to a strong presumption that the interpretation correctly represents the sense in which Congress used the words in the prior Act.

In *Alexander* v. *The Mayor and Commonalty of Alexandria,* 5 Cranch, 1, 7, 8, the rule was enunciated:

> "If in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

And when applicable the rule has always been observed and treated as controlling on the courts in interpreting the terms of a statute and expounding its provisions. (See 25 R. C. L. Sec. 288; See also *Copper Queen Consolidated Mining Co.* v. *Arizona,* 206 U. S. 474; *Davis* v. *Pringle,* 1 F. (2d), 860, 863; *Dow* v. *U. S.,* 226 Fed. 145; *Schweizer* v. *Mayer,* 297 Fed. 334; *Edwards* v. *Wabash Ry. Co.,* 264 Fed. 610, 618; 36 Cyc. 1153.)

Conclusion

One of the protesting steam railroads introduced much evidence before the Interstate Commerce Commission designed to show the relationship between petitioner and the so-called Duke interests, and the contention was advanced in the court below, and will probably be advanced here, that the relationship, if not illegal and in violation of the Commodities Clause (34 Stat. L. 584), was at least improper and contrary to sound railroad policy.

If the contention were sound, it would still be irrelevant to the question presented upon this record. If the Commission's authority extends to the proposed extensions then it is conceded that its order is valid and must be sustained. On the other hand, if the Commission's authority does not extend to the proposed extensions, then, although the Commission could consider and incidentally determine the question of its authority raised in the application, when once it is determined that the Commission was without authority, no other question connected with the proposed extensions can be considered.

The relationship is not illegal or improper; and the proposed extensions would not be constructed in response to the demand of the Duke interests, but in response to the unanimous demand of State, county, and municipal authorities and members of the shipping and traveling public of the territory in question. (R. 223.)

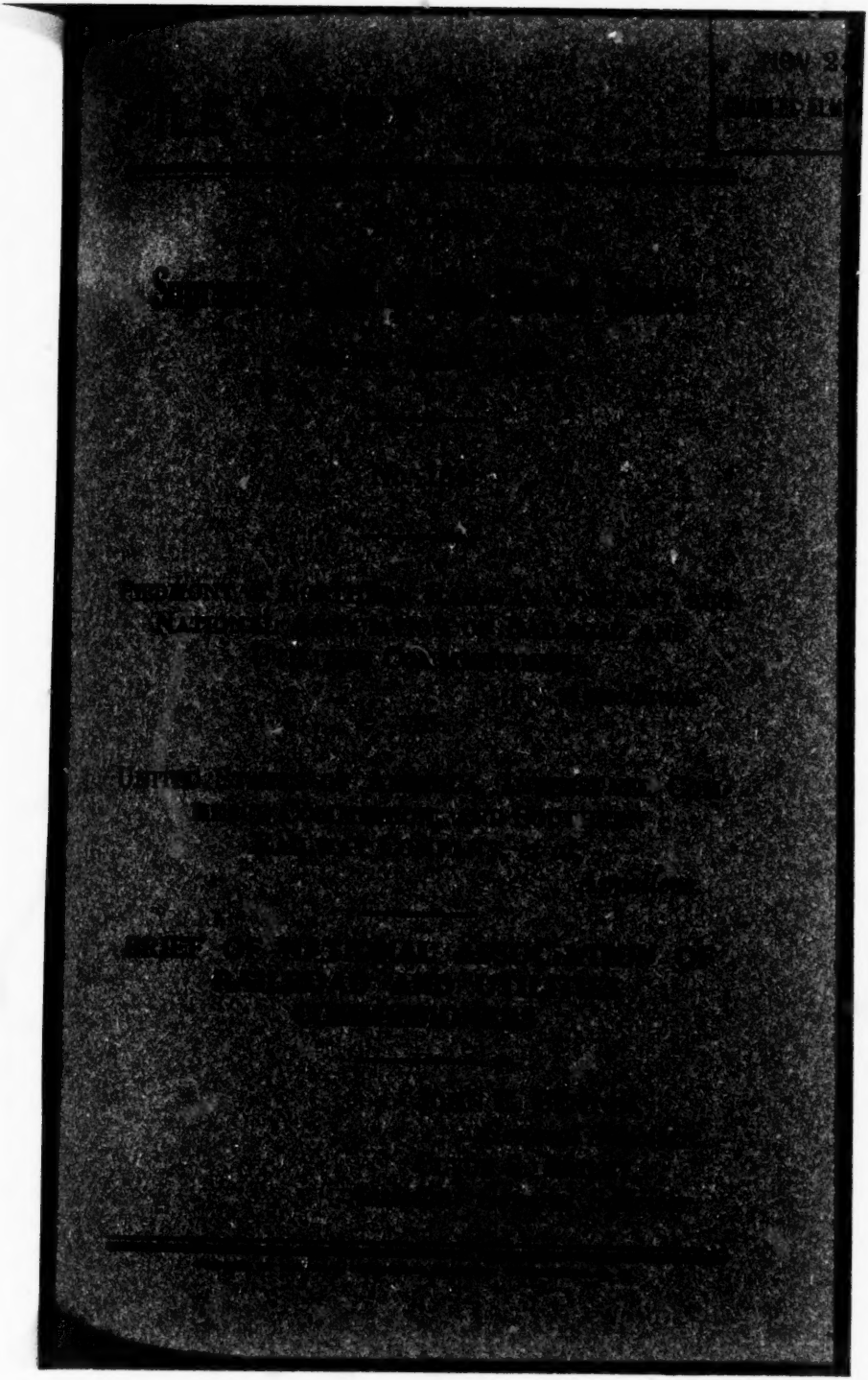
In conclusion, we submit that, upon the admitted facts and those established without substantial contradiction, that part of the Commissions' order of April 3, 1928, in which it assumed jurisdiction over the proposed extensions was unauthorized, and therefore that the final decree of the District Court should be reversed and a decree entered or directed setting aside and annulling the order of the Commission. The reversal of the decree and the

annulment of the order would leave the way clear for Congress to correct the "mischiefs" of uncontrolled expansion by interurban electric railways or to control them in a well defined and concrete manner—that is, if Congress should entertain the same views of the "mischiefs" as the court below and the Commission. Affirmance of the decree would leave a "No Man's Land" between national and local authority, which could be securely occupied by either only at the end of protracted and wasteful litigation.

Respectfully submitted,

W. G. CRAIGHILL, JR.,
Attorney for Piedmont and Northern Railway Co.,
Appellant

CARTER MONTAGUE
H. J. HAGERMAN
Of Counsel.
October 31, 1929.



INDEX

	Page
Reference to Opinion Below	1
Statement of Ground of Jurisdiction Invoked	2
Statement of the Case	2
The Interest of the National Association of Railroad and Utilities Commissioners	9
Specification of Error	11
Argument	12
Summary of Points	12
The Court Has Jurisdiction to Review the Order Sought to be Set Aside	13
Paragraph (22) of Section 1 Excludes the Piedmont & Northern From the Jurisdiction of the Interstate Commerce Commission Over New Construction	19
The Term "Interurban Electric Railway" as Used in said Paragraph (22) was Construed by the Commission and by the Court Below as not Including the Piedmont & Northern	20
The Term "Interurban Electric Railway" had a Well-Understood and Definite Meaning at the Time the Transportation Act, 1920, was Enacted, Which Embraced the Piedmont & Northern	22
The Supreme Court so Used the Term	23
The United States Railway Labor Board so Construed the Term	29
The Interstate Commerce Commission so Used the Term	29

Page

The Commission's Several Bureaus Have Heretofore Classified the Piedmont & Northern with the Interurbans ---------- 33

The Phrase, "Street, Suburban, or Interurban Electric Railways," as Used in Transportation Act, 1920, Has Been Generally Understood by Electric Railway Officials, by State Commissions, and by the Investing Public to Include all Electrics-------- 34

Congress Has Often Used the Term "Interurban" in a Like Manner------ 42

Paragraph (22) was Inserted by Congress in Response to Requests for the Exclusion of all Electrics---------- 47

The Request of the Electric Railroads--- 49

The Request of the Association of Business Organizations---------- 51

The Request of State Regulatory Commissions ---------- 52

Congress Used the Term "Interurban Electric" With Obvious Intent that It Should Include Roads of the Type of the Piedmont & Northern---------- 56

The Commission and the Court Below Have Erroneously Disregarded the Obvious Intent of Congress---------- 65

The Commission's Construction of the Term "Interurban" in This Case Is Inconsistent with Its Construction of the Same Term in Other Cases-- 71

Page

The Opinions of This Court Have Been Misapplied Below ---------- 73

There Is no Evidence to Sustain the Commission's Finding that the Piedmont & Northern Is not an Interurban ---------- 78

The Commission and the Court Below Called the Piedmont & Northern an Interurban, But Refused It the Benefit of that Classification ---------- 85

CASES CITED

Application of Section 15a to Lackawanna & Wyoming Valley Railroad, 105 I. C. C. 178, 183 ---------- 71

Cedar Rapids & I. C. R. & Light Co. v. Chicago & N. W. R. Co., 13 I. C. C. 250 ---- 28

Chicago & M. Electric R. Co. v. Illinois C. R. Co., 13 I. C. C. 20 ---------- 28

Chicago, Ottawa & Peoria Ry. Co. v. Chicago & Northwestern Ry. Co. et al., 33 I. C. C. 573, 575 ---------- 32

Cincinnati & Columbus Traction Co. v. Baltimore & Ohio Southwestern R. R., 21 I. C. C. 486 ---------- 30

Electric Railway Mail Pay Case, 58 I. C. C. 455 ---------- 32, 45

Ex Parte 38, 122 I. C. C. 414 ---------- 29, 73

Hild et al v. Chicago, No. Shore & Milwaukee R. R., 150 I. C. C. 367 ---------- 11

Jurisdiction Over Electric Lines, 33 I. C. C. 536 ---------- 26

Lake County v. Rollins, 130 U. S. 662 ---------- 23

Page

Lehigh Valley Railway v. United States, 243 U. S. 413 ---------- 16
Louisville Board of Trade v. Indianapolis, Columbus & Southern Traction Co., 27 I. C. C. 499, 500 ---------- 31
Michigan United Railways Company, Application of, 67 I. C. C. 452 ---------- 72
Omaha & Council Bluffs Street Railway Co. v. Interstate Commerce Commission, 230 U. S. 324 ---------- 23
Procter & Gamble Co. v. United States, 225 U. S. 282 ---------- 9, 13, 16
Sacramento Northern Application, 71 I. C. C. 653, 79 I. C. C. 782 ---------- 73
St. Louis, Springfield & Peoria R. R. v. Peoria & Pekin Union Railway Co., 26 I. C. C. 226 ---------- 30
Spokane & Inland Empire Railway v. United States, 241 U. S. 344 ---------- 24, 76
Texas & Pacific Railway v. Gulf, Colorado & Santa Fe, 270 U. S. 266 ---------- 7, 13, 14, 18, 19, 73, 75
United States Labor Board Decision No. 33, December 11, 1920 ---------- 29
Village of Hubbard v. United States, 266 U. S. 474 ---------- 24

IN THE

Supreme Court of the United States

October Term, 1929

No. 164

PIEDMONT & NORTHERN RAILWAY COMPANY and NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS,

Appellants.

VS.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, *et al*,

Appellees.

BRIEF OF NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

REFERENCE TO OPINION BELOW

The appellants seek to set aside a judgment entered in the United States District Court for the

Western District of South Carolina, affirming an order of the Interstate Commerce Commission. The decision of the Interstate Commerce Commission was reported 138 I. C. C. 363. The opinion of the Court was reported 30 F. (2d) 421.

STATEMENT OF GROUND OF JURISDICTION INVOKED

It is claimed that jurisdiction to review the order involved exists under 38 Stat. L. 219 and 36 Stat. L. 539.

STATEMENT OF THE CASE

A statement of the case can be largely taken from the opinion of the court below. The quoted matter under this caption is taken from that opinion unless otherwise indicated. The italics are ours.

The Piedmont and Northern Railway Company "owns and operates a line of electric railway in South Carolina, extending from Greenwood to Spartanburg, a distance of 89.9 miles, with a branch from Belton to Anderson of 11.3 miles; and also a line of electric railway in North Carolina extending from Gastonia to Charlotte, a distance of 23.5 miles, with a branch to Belmont of 3.2 miles; and uses these lines, 127.9 miles in all, in the transportation of persons and property, as a common carrier, in interstate commerce. In the latter part of 1926, the corporation determined to build extensions of its road, 128 miles in length,

consisting of a line of about 53 miles in length, running from Spartanburg, South Carolina, to Gastonia, North Carolina, and also a line 75 miles in length from Charlotte to Winston-Salem in the latter State. This project came to the attention of the Commission and it notified the Railway Company by letter of March 8, 1927, that it would be expected to file an application for authority to do the work under Paragraphs 18 to 21 of Section 1 of the Interstate Commerce Act as amended by Transportation Act, 1920, 41 Stat. 456, 474, 477-8. The Commission said that in its opinion the railroad was not an interurban electric railway excepted from its jurisdiction by Paragraph 22 of Section 1 of the act, 41 Stat. 478. Accordingly on March 26, 1927, the Railway Company filed an application for a certificate of public convenience and necessity, without prejudice, however, to its right to assert that in this respect it is not subject to the authority of the Commission." (R. 222.)

"The existing lines of the Piedmont and Northern have connections with the street railway systems of the cities which it serves, acquired either by direct ownership or by contracts for trackage rights. Thereby *its passenger cars within the cities en route become street railway facilities.*" (R. 233.)

The Commission found that the road "performs an ordinary interurban passenger service." (R. 37.)

"*Between the cities* there are frequent stops for passengers *at an average distance of 1.2 miles*

apart—that is to say, 106 stops in 128 miles of road. 49 passenger trains daily traverse various parts of the line. There are *more daily trains and more frequent stops* than on the corresponding mileage of the Southern Railway, *a parallel steam railroad admittedly of the first class.* Furthermore, the spacing between the trains is more uniform. *The passenger cars are motivated by self-contained motor units, and are lighted from a trolley. By reason of their equipment, they are not acceptable upon steam lines.*

"*The use of city streets for the collection and delivery of freight is a peculiar characteristic of the Piedmont and Northern and other interurban roads.* Its electric locomotives and cars are constructed to take the sharp curves and steep grades peculiar to the city streets. *It is even possible for electric locomotives to go inside a building where a steam locomotive cannot go.* The switching service thus made available in the cities is *extremely convenient for industries of all sorts, including factories, wholesale houses and even retail houses. The street railway lines are used largely for delivery and pick up service;* but the bulk of the through traffic does not move over the city streets.

"*Local freight service between cities* on the petitioner's lines is also *more flexible and convenient than that rendered by the steam railways.* There are *more daily freight trains* in small units. 18 trains which average 14 loaded and 6 empty cars, are operated daily. There are *more frequent stops on the Piedmont & Northern than on the Southern*

in local station to station movement of freight. In addition, there are local switches for industrial plants, so that *freight is delivered and picked up all over the line. In the delivery of less than car load freight in short distances up to sixty miles, there is more expedition and greater dispatch than in the handling of similar business on the Southern.* The electric locomotives for the movement of freight are of somewhat lighter character than those employed on the steam roads and are unfit for long haul heavy load traffic such as that hauled by the electric locomotives on the Virginian Railway. The cars and locomotives are so equipped that they can be used either upon a voltage of 1500 d. c. between the cities or 600 d. c. inside the cities." (R. 233.)

"The roadbed, rolling stock and equipment are of such a character that it is well suited to cooperate with steam railroads in the transmission of freight to distant points. Freight trains of 45 cars, using 2 locomotives, are not unusual; the average train is 20 cars. Most of the freight traffic is handled in cars owned by steam railroads but the petitioner owns 165 automobile cars and 99 other box cars, all of which are of ordinary steam railway type and move freely on foreign roads. Altogether, there are 337 cars. The construction is that of a standard steam railway." (R. 235.)

"Traffic agreements have been made with the Seaboard Air Line, the Southern Railway and other roads with reference to rates and the division of revenue received in the interchange of traffic.

While street railways have been used for local deliveries, the through freight does not pass through the cities, but is carried over additional lines which run around the cities and avoid the city streets.

"The business methods of the road are similar in many respects to those of steam railroads. It is a party to the tariffs of the steam roads and to the uniform express contract of the American Railway Express Company. It is a member of the American Railway Association, the Southern Freight Association and other traffic organizations of the steam roads. It is represented by powers of attorney in nearly every tariff bureau of the United States and has 502 published tariffs. It follows the methods of steam roads in matters of rate divisions, interline billing, claim settlements and in all of its relations with shippers and consignees. It publishes a tariff directory which is on file with the Interstate Commerce Commission. It has a general agent in New York, a commercial agent at Atlanta and at all of its connecting points." (R. 236.)

"Petitioner's witnesses, speaking in round figures, state that 92 per cent of the revenue is derived from freight and only 8 per cent from passenger traffic. * * * While 97.63 per cent of the passenger revenue was derived from local traffic, and only 2.37 per cent from interchange, the reverse is true with revenues from freight of which only 4.75 per cent came from local station-to-station movement and 95.25 per cent from traffic handled jointly with steam roads. Of 72,886

loaded cars handled, 68,370 were interchanged, most of them in interstate movement, reaching all parts of the United States." (R. 237.)

It is its general freight business, made possible by the interchange relations with steam lines so described, upon which "the Commission, in its opinion, and the opponents of the petitioner in this case depend to show that the road is not merely an interurban electric railway, but something far more important in the business of transportation" (R. 235), and hence not within the exception created by paragraph (22) of Section 1 of the Interstate Commerce Act.

The Piedmont and Northern has not been classified with steam roads for valuation purposes by the Interstate Commerce Commission. It is subject to the same accounting rules as other electric lines. The Commission, on October 12, 1920, ruled that it was an interurban electric railway not subject to Section 20a of the Interstate Commerce Act, relating to the issuance of securities. (R. 143, 249.) *The Railroad Labor Board, construing an exception for interurbans the same in terms as the exception contained in paragraph (22), held that the Piedmont and Northern was an interurban electric.* (R. 248.)

Having filed its application for a certificate, in accordance with the procedure outlined by the Commission in its notice, and outlined also in the opinion of this Court in *Texas & Pacific Railway v. Gulf, Colorado & Santa Fe*, 270 U. S. 266, the Piedmont & Northern moved to dismiss the same

for lack of jurisdiction, upon the ground that as to new construction it was exempt from the Commission's jurisdiction under the provisions of paragraph (22) of Section 1 of the Interstate Commerce Act. (R. 28.)

The Interstate Commerce Commission did not grant the motion to dismiss, but, after a hearing, ruled that the Piedmont & Northern was not an interurban electric railway within the meaning of said paragraph (22), and that the Commission had jurisdiction upon the application. (R. 40.) Exercising the jurisdiction thus asserted, it denied the application for a certificate. (R. 77.) The ruling was made a part of the order of denial by reference. (R. 79.)

The Piedmont & Northern then applied to the United States District Court for the Western District of South Carolina to set aside the order. The case was submitted upon the evidence taken before the Commission to a statutory court. That court handed down an opinion sustaining the Commission's order (R. 222), and a decree was entered denying the relief prayed for, and dismissing the petition. (R. 252.) This appeal was prosecuted from that decree. (R. 262.)

A preliminary question of jurisdiction is involved. In the court below the Government moved to dismiss the bill upon the ground that the court is without jurisdiction to review the order of the Commission complained of in the bill, for the reason, as it was alleged, that the order is a negative order within the meaning of the decision of this

Court in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282 (R. 97). The case, however, was disposed of upon other grounds, as above stated.

THE INTEREST OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

The National Association of Railroad and Utilities Commissioners is a party to the proceedings, having intervened therein before the Interstate Commerce Commission, and also having intervened in the court below as a party plaintiff seeking to have the order declared void. The National Association of Railroad and Utilities Commissioners is a voluntary association which includes in its membership the members of the Corporation Commissions, Railroad Commissions, Public Service Commissions, and other regulatory commissions and boards of all of the several states of the United States, except Delaware, which has no commission. Practically all of said commissions and boards, under the laws of their respective states, exercise jurisdiction over common carriers, including interurban electric railways, and many of them exercise jurisdiction over such railways with respect to construction of new lines and extensions of existing lines (R. 110).

The interest of the Association in this case arises from the fact that it involves the construction of paragraph (22) of Section 1 of the Interstate Commerce Act, and the determination of the extent to which the jurisdiction of the several states, and of their duly authorized regulatory

commissions and boards, was preserved over electric railroads such as the Piedmont and Northern by said paragraph (22). The Commissions of North and South Carolina both favor the proposed construction (R. 40). In the interest of those states, the Association would protest a construction which would deprive them of jurisdiction which Congress has chosen to leave undisturbed. The Association's greatest interest, however, is in the precedent which the Court's decision in this case will make. The question involved is one which affects in a very vital way the ability of state regulatory commissions to perform the duties laid upon them by state law. If the order of the Interstate Commerce Commission here involved shall be sustained, the status of every important electric railroad engaged in interstate commerce will become at once uncertain. Neither the roads themselves nor the state regulatory commissions can know when they are subject to state jurisdiction as to construction and abandonment and as to securities issues. And there will be no way in which the uncertainty can be resolved except by litigation before the Interstate Commerce Commission or in the courts, and then such litigation will solve the uncertainty for the purpose of the case litigated only. Without such litigation the state commissions can not know when it is their duty to demand from electric railroads obedience to state laws, and, on the other hand, the electric carriers can not know when they may safely consider themselves interurbans, and yield obedience to state laws.

Since Transportation Act, 1920, was passed, and prior to the Commission's decision in this case, hundreds of millions of dollars of securities were issued by electric railroads under the authority of state regulatory officials, in the belief that the issuing carriers were exempt from the provisions of the federal law, as interurban electrics. If the Commission's construction of the statute is valid these securities, under the provisions of Section 20a, are in large part void, and the officers, attorneys, and agents of the carriers issuing the same are liable therefor, in civil actions, and are liable also to criminal prosecution, under paragraph (11) of Section 20a of the Interstate Commerce Act. The validity of important issues of securities (*Applications of Chicago, North Shore & Milwaukee Railroad*, cited page 41 this brief) already appear to be in controversy. See *Hild et al.* v. *Chicago, North Shore & Milwaukee Railroad*, 150 I. C. C. 367.

The interest of the state commissioners, therefore, runs to the protection of the jurisdiction of state regulatory officials for the future, and to the protection also of the validity and effectiveness of orders heretofore made by them in the exercise of such jurisdiction.

SPECIFICATION OF ERROR

The assignment of errors sets forth the following:

> "The District Court erred. * * *
> "(3) In holding that the railway of peti-

tioner is not an interurban electric railway, which is not operated as a part of a general steam railroad system of transportation." (R. 264.)

This is the only error which will be discussed in this brief, or upon oral argument, on behalf of the National Association of Railroad and Utilities Commissioners.

ARGUMENT

SUMMARY OF POINTS

The Court Has Jurisdiction to Review the Order Sought to be Set Aside.

Paragraph (22) of Section 1 Excludes the Piedmont and Northern from the Jurisdiction of the Interstate Commerce Commssion Over New Construction.

The Term "Interurban Electric Railway" Had a Well Understood and Definite Meaning at the Time the Transportation Act, 1920, Was Enacted, Which Embraced the Piedmont and Northern.

Paragraph (22) Was Inserted by Congress in Response to Requests for the Exclusion of All Electrics.

Congress Used the Term "Interurban Electric" with Obvious Intent That It Should Include Roads of the Type of the Piedmont and Northern.

The Commission and the Court Below Have Erroneously Disregarded the Obvious Intent of Congress.

The Commission's Construction of the Term "Interurban" in This Case Is Inconsistent with Its Construction of the Same Term in Other Cases.

The Opinions of This Court Have Been Misapplied Below.

There Is No Evidence to Sustain the Commission's Finding That the Piedmont and Northern Is Not an Interurban.

The Commission and the Court Below Called the Piedmont and Northern an Interurban, but Refused It the Benefit of That Classification.

THE COURT HAS JURISDICTION TO REVIEW THE ORDER SOUGHT TO BE SET ASIDE

The Piedmont and Northern has in this case followed the exact procedure outlined by this Court in *Texas & Pacific* v. *Gulf, Colorado & Santa Fe*, 270 U. S. 266.

In that case, which involved the construction of a track claimed by the carrier to be within the exception of paragraph (22) of Section 1 as an industrial track, the Court said:

> "A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track."

The motion to dismiss, made below, upon the ground that the order of the Commission herein sought to be set aside is a negative order, within the rule laid down in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, disregards this approval of this Court of the procedure which has been followed, and overlooks the true ground of the decision in the *Procter & Gamble* case.

When this Court in *Texas & Pacific Railway* v. *Gulf, Colorado & Santa Fe,* said that a carrier desiring to make construction could, by making application for a certificate, "secure a determination of the question" of its right to construct without a certificate, it, of course, meant a determination according to law, and subject to judicial review for the correction of errors made by the Commission in its action upon such application.

If the Commission, upon the petition of the Piedmont and Northern, had asserted jurisdiction, and had issued the certificate asked for therein, there can be no question that any opposing carrier, a party to the case, could have maintained an action to review the order. In such case the application would have produced a "determination" of the question presented.

On the other hand, if the Commission, in the decision which it has made adverse to the Piedmont and Northern, has committed an error of law, it will not be contended that the carrier is without remedy. If this suit to correct the error can not be maintained, then the carrier may proceed with the proposed construction, and defend in any proceeding brought to compel obedience to the order by showing that it is in fact an interurban electric railway. If that course must be pursued, the application has not resulted in a "determination" of the question designed to be presented to the Commission by the application: and it would appear that the procedure before the Commission outlined by this Court in the *Texas & Pacific* case, will result

in a "determination" only when the Commission asserts jurisdiction and grants the certificate sought for. In all other cases the question will remain undetermined. The Court can not have intended to suggest any such one-sided procedure.

The argument, moreover, that there can be no review of this order in this case because it is a negative order, disregards the true character of the order. The Commission's report is a part of the order. That report contains the affirmative ruling that the Piedmont and Northern is a railroad of such character as to be subject to the Commission's jurisdiction as respects proposed new construction. That is a ruling which was necessary to a disposition of the application before the Commission. By it the rights of the applicant carrier were adversely affected. If it was erroneous as a matter of law, the carrier is entitled to be relieved by a judicial review sought in the manner provided by statute. The District Court Jurisdiction Act (38 Stat. L. 219) transferred to the District Court the pre-existing jurisdiction of the Commerce Court, which extended to

> "cases brought to enjoin, set aside, annul or suspend in whole or in part *any* order of the Interstate Commerce Commission." (36 Stat. L. 539.)

On the face of the statute the jurisdiction granted would appear to extend to all orders, but the Court has held that it does not extend to orders

which merely refuse an exercise of the Commission's legislative power. Notwithstanding such an order may be based upon an erroneous conception of the law, the setting of it aside would afford no relief to a complaining party unless the Court should also go forward and exercise the legislative power which the Commission has refused to exercise, and the exercise of such power is beyond the jurisdiction of the courts.

The setting aside of the Commission's order in *Procter & Gamble Co. v. United States*, would not have vindicated any right of the complaining company. Vindication of that right, if any right existed, required an exercise of the Commission's legislative power; and since that power could not be exercised by the Court, it was held that a proper interpretation of the statute providing for judicial review did not vest the Court with jurisdiction to determine questions of law involved in a proceeding where nothing the Court could do would vindicate the legal right of any party.

The same situation existed in *Lehigh Valley Railway* v. *United States*, 243 U. S. 413, cited and relied upon by the Commission in the court below. There the Lehigh Valley Railroad had sought to be relieved from the effect of a federal statute by an order of the Interstate Commerce Commission. The Panama Canal Act of 1910 authorized the Commission to extend the time during which a rail carrier might continue to control a water carrier operating through the Panama Canal, provided the Commission should find that the exten-

sion granted would not exclude or reduce competition between such rail line and such water carrier.

Upon the application of the Lehigh Valley Railroad for an extension, the Commission found that such rail carrier did or might compete with the water carrier involved, and refused to grant the extension. It was this order which the Lehigh Valley sought to set aside. The Court held that the order was "negative in substance as well as in form." In other words, the Court held that the appellant had no right which could be vindicated by setting the order aside. By the statute, if it competed with the boat line, it was forbidden to continue its ownership after the date specified by the statute. From this requirement of the statute it could not be relieved except by an administrative finding made by the Commission, and by an order of the Commission based upon such finding. A setting aside of the order could not therefore change the status of the carrier. It would remain inhibited by the statute from holding beyond the date fixed by the statute. This situation could be changed only by a finding of the Commission and an order of the Commission. This was clearly pointed out by the Court in its opinion, as follows:

> "The risk to which the railroad was left subject did not come from the order but from the above-mentioned section of the Panama Canal Act."

The situation in this case is diametrically opposite. The Piedmont & Northern, as an interurban electric railway, was not subject to the jurisdiction of the Interstate Commerce Commission as to its proposed new construction. It had the right to build without procuring any certificate from the Commission. The question as to its interurban character having arisen, however, it was in effect directed by the Interstate Commerce Commission to follow the procedure which had been outlined by this Court in *Texas & Pacific Railway* v. *Gulf, Colorado & Santa Fe*, so that a record might be made upon which the question of jurisdiction might be determined in an orderly manner. It made such application, following strictly the procedure outlined by this Court.

Upon the application so presented to the Commission the question of the character of the applicant, and whether excluded from the Commission's jurisdiction by paragraph (22) of Section 1, arose as preliminary questions necessarily to be determined for the proper disposition of the case, and hence within the Commission's jurisdiction to determine. The Commission's decision, therefore, when made, became necessarily binding upon the parties unless set aside as erroneous in law in a proper proceeding brought to review such decision.

The Commission determined and ruled that the Piedmont and Northern was not an interurban, and was subject to the Commission's jurisdiction as to the proposed construction. That decision fixed the status of the Piedmont and Northern for

the purposes of the matters involved in the proceeding before the Commission, unless the order shall be held erroneous and set aside. If it shall be set aside, as not sustained by the evidence before the Commission, the status of the Piedmont and Northern as an interurban electric railway, not subject to the Commission's jurisdiction as to construction, will be re-established, and its right will be vindicated. It will have procured "determination" of its questioned right by following the course which this Court indicated as proper in *Texas & Pacific Railway* v. *Gulf, Colorado & Santa Fe*, heretofore cited.

PARAGRAPH (22) OF SECTION 1 EXCLUDES THE PIEDMONT AND NORTHERN FROM THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION OVER NEW CONSTRUCTION

Paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act confer jurisdiction upon the Interstate Commerce Commission over the construction of new lines and over extensions of lines and over the abandonment of existing lines and parts of lines. Paragraph (22), however, provides as follows:

> "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street,

> suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

This paragraph excludes the Piedmont and Northern from the Commission's jurisdiction over construction. The remainder of this brief will be directed to the support of this proposition.

THE TERM "INTERURBAN ELECTRIC RAILWAY" AS USED IN SAID PARAGRAPH (22) WAS CONSTRUED BY THE COMMISSION AND BY THE COURT BELOW AS NOT INCLUDING THE PIEDMONT AND NORTHERN

The Commission and the statutory court have both construed "interurban electric railway" as not including the Piedmont and Northern. Neither the Commission nor the Court, however, makes any attempt to define the term "interurban electric railway." The Commission says:

> "It appears clearly that the applicant's railroad, as proposed to be extended, would be a commercial railroad operated by electricity and not an electric interurban line within the meaning of paragraph (22) of section 1. We are of opinion that we have jurisdiction of the application."

The Court below said:

> "It is true that an interurban carrier may

be entitled to that descriptive name although it participates in general freight traffic; but it does not follow that every electric carrier, so engaged, is an interurban railroad. Freight traffic may be limited in extent and within the scope of a carrier devoted primarily to local business, and at the same time, be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail and express, and yet be so restricted in its operations that it may not be properly classified with general steam carriers whose operations cover a wide field. See the discussion in Lackawanna & Wyoming Valley Ry., 105 I. C. C. 178. * * *

"It is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line betwen an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont and Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn there can be no doubt that a railroad, 92 per cent of whose traffic comes from the general transportation of freight, and 95

> per cent of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad."

It will thus be seen that the classification of the Piedmont and Northern was made to depend not upon whether it fell within the class of roads commonly called "interurban electric railways," but upon the extent of its freight business as compared with other business, and upon the proportion of that business interchanged with steam lines.

These were criteria not prescribed by Congress for the application of which there was no warrant.

THE TERM "INTERURBAN ELECTRIC RAILWAY" HAD A WELL UNDERSTOOD AND DEFINITE MEANING AT THE TIME THE TRANSPORTATION ACT, 1920, WAS ENACTED, WHICH EMBRACED THE PIEDMONT AND NORTHERN

It is an elementary rule that the purpose of the construction of any language in any statute or document is the discovery of the intent of the person or persons who used the language, and that the first resort in every case is to the words used and to their ordinary significance.

> "If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of

> the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." (*Lake County* v. *Rollins*, 130 U. S. 662.)

For more than a decade before the Transportation Act, 1920, was enacted, the term "interurban" had been commonly used to describe a road of the class to which the Piedmont and Northern belongs. This Court, other departments of the federal government, the Interstate Commerce Commission itself and its principal bureaus and the Congress have used the term in that sense, and it was commonly so used by the public generally.

If this be true, it must be assumed that Congress used the words in that commonly accepted sense, and the intent of the statute may not be varied by resort to construction, under which construction less than the entire class of interurban electrics are granted the benefit of the exception made in said paragraph (22).

THE SUPREME COURT SO USED THE TERM

In *Omaha & Council Bluffs Street Railway Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, the Court was dealing with an electric railway running between Omaha, Nebraska, and Council Bluffs, Iowa. The Interstate Commerce Commission had asserted jurisdiction over the fares of that road, and it was contesting the validity of the Commission's order upon the ground

that it was not a "railroad" within the meaning of that term as used in the Act to Regulate Commerce. The Court sustained the contention.

In considering one of the contentions made by the Commission, the Court said:

> "But it is said that since 1887, when the act was passed, *a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed.* We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight." (Italics ours.)

Heretofore this Court has used the term "interurban electric railway" as embracing electric railways generally, other than street and suburban railways. Later herein is cited *Spokane & Inland Empire Railway* v. *United States*, 241 U. S. 344, which involved a standard gauge road engaged in the general transportation of passengers and freight between the Coeur d'Alene region in Idaho and Spokane, operated apparently in the same manner as the steam roads conduct their business. That road was called by the Court an "interurban electric."

Finally, in *Village of Hubbard* v. *United States*,

266 U. S. 474, where the question involved was whether certain interurban electric passenger carriers were subject to the rate-making jurisdiction of the Interstate Commerce Commission, it seems quite clear that the Court considered the meaning of the phrase "street, suburban, and interurban electric railways" as embracing the electric roads generally, in contradistinction to the steam railroad class. The discussion is directed to the Commission's jurisdiction over the electrics. The Court said:

> "These cases * * * present * * * the question whether *interurban electric railroads* engaged in interstate commerce are subject generally to regulation by the Interstate Commerce Commission. * * *
>
> "In 1897, the Commission assumed jurisdiction over the passenger fare of *an electric railroad* which operated between the District of Columbia and a neighboring village in Maryland. *Willson* v. *Rock Creek R. Co.*, 7 Inters. Com. Rep. 83. The development of *interurban roads* became general about 1902. The authority to regulate *them* has been consistently exercised by the Commission in many cases and for many purposes. Since 1915, *interurban electric roads* have been required to file with it annual reports of their finances and operations. *Jurisdiction over Urban Electric Lines*, 33 Inters. Com. Rep. 536." (Italics ours.)

In a footnote at this point is the following: "The uniform system of accounts for *electric railways* prescribed by the Commission became effective July 1, 1914." (Italics ours.)

The reference to *Jurisdiction Over Electric Lines* is to a report in a case which, as the Commission in the report said, "involved primarily the propriety of requiring *interstate electric railway companies* to include in their monthly reports of accidents returns covering their entire operations, whether in strictly city service or otherwise. * * * although mention was made of the general question of the Commission's power over *electric railways as a class* distinguished from steam roads." (Italics ours.)

Continuing, the Court said:

> "In exercising authority over their passenger fares, no distinction has been made between those *interurban roads which were engaged in the general transportation of freight* in addition to their passenger and express business and those which were not. On the other hand, the distinction suggested in *Omaha & C. B. Street R. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, 337, 57 L. ed. 1501, 1506, 46 L. R. A. (N. S.) 385, 33 Sup. Ct. Rep. 890, between *interurban railroads* and urban or suburban street railways, has been carefully observed.
>
> "Neither in the Act to Regulate Commerce, * * * nor in any amendments

thereto prior to that of June 18, 1910, * * * is there any specific reference to *electric railroads.* * * * As the act made no distinction between railroads operated by steam and those operated by electricity, the Commission made none. Similarly, the words 'common carrier by railroad,' contained in the Federal Employers' Liability Act, April 22, 1908, * * * and in the Hours of Service Act, March 4, 1907, * * * were applied to *interurban electric railroads.*

"The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of Congress * * *." (Italics ours.)

Nothing seems clearer than that the Court was discussing the electric railroads, commonly so-called, in contradistinction to the steam railroad class, and that it used the term "interurbans" to embrace all such electrics as were not embraced within the description "street and suburban railways." This would appear from the following from the opinion:

"Transportation Act, February 28, 1920, * * * provided expressly, in five sections, for the exclusion of certain electric railways from the operation of the powers conferred; and it also differentiated interurban electric railways from street and sub-

> urban railways by specific reference to each; * * *."

That the Court understood this term as applied to roads of the character of the Piedmont & Northern is apparent from this fact. In the opinion the Court said:

> "The Commission entertained, in 1908, applications of *interurban electric railroads* to establish for freight through routes and joint rates with steam railroads." (Italics ours.)

In a footnote to this opinion, as supporting the statement just quoted, are cited *Chicago & M. Electric R. Co.* v. *Illinois C. R. Co.*, 13 Inters. Com. Rep. 20; *Cedar Rapids & I. C. R. & Light Co.* v. *Chicago & N. W. R. Co.*, 13 Inters. Com. Rep. 250. Reference to these reports of the Commission, thus cited, will show that these roads, referred to by the Court as "interurban electric railroads" were both standard gauge, freight moving roads, able not only to handle freight in carloads, but in trains. The report further shows that the Chicago & Milwaukee, when the case was heard, had through routes and joint rates, covering freight, in effect with the Wisconsin Central, and that it formerly had like routes and rates in effect with the Illinois Central. The Commission ordered joint freight rates for the Cedar Rapids & Iowa City with the Chicago & Northwestern.

Further, as showing that these roads are of the same general character as the Piedmont & Northern, reference is made to the report of the Commission in *Ex Parte 38*, 122 I. C. C. 414, in which was considered the application of the Commission's rules for inspection of locomotive boilers, and in which the Commission ruled that certain roads, therein named, could "not properly be classed as street, suburban, or interurban electric railways." Among the roads so excluded from the "interurban electric" class were the Chicago, North Shore & Milwaukee Railroad Company and the Cedar Rapids and Iowa City Railway.

THE UNITED STATES RAILWAY LABOR BOARD SO CONSTRUED THE TERM

The United States Railroad Labor Board, construing the term "interurban electric railway" as used in Section 300 of the Transportation Act, 1920—later again referred to in this brief—held the term to include the freight carrying electrics, regardless of the amount of their business, or the manner in which it was carried on. U. S. Labor Board, Decision No. 33, December 11, 1920.

THE INTERSTATE COMMERCE COMMISSION SO USED THE TERM

The Interstate Commerce Commission itself, in its formal reports, had repeatedly used the term "interurban" and "interurban electric" to designate a class of roads of the same type, and con-

ducting the same character of business as the Piedmont & Northern.

In 1911, in *Cincinnati & Columbus Traction Co.* v. *Baltimore & Ohio Southwestern Railroad*, 20 I. C. C. 486, the Commission, dealing with the petition of an electric line for an order establishing for the benefit of said line through routes and through rates for freight traffic with certain connecting steam railroads, referred to the petitioning carrier as belonging to "that class of roads *commonly referred to as interurban roads.*" (Italics ours.)

In 1913, in *St. Louis, Springfield & Peoria Railroad* v. *Peoria & Pekin Union Railway Co.*, 26 I. C. C. 226, 227, 228, the Commission referred to petitioner's properties as "*lines of interurban electric railways*" working under a common management with other electric lines, all known as the Illinois Traction System. Describing the same the Commission said:

> "This system operates 418 miles of railway and extends from St. Louis, Mo., on the south to Peoria, Ill., on the north, and to Danville and Ridge Farm, Ill., on the east. * * * The complainants conduct a general passenger and freight business, and their lines are standard gauge with rails and ballast of regular steam-road standard. Their traffic manager testified that they own 900 cars, of which approximately 125 are passenger and motor cars and 775 are freight cars. The freight cars are of 80,000

pounds capacity each, were constructed in accordance with master car builders' rules, and are equipped with safety appliances required by law and rules of the Commission. It is apparent from the evidence that the complainants' equipment is standard and such as may be interchanged in interstate traffic, and that their roadbed and bridges are built so as to permit the passage over them of standard railroad cars."

The character of business done by these lines, which the Commission termed "interurban," is indicated by the petition before the Commission, which was that the defendant be ordered "to establish through routes and joint through rates between points on the line of road of your petitioners and points on the line of road of the defendant and may be compelled to provide reasonable facilities for operating such through routes and may be ordered to make reasonable rules and regulations with respect to the interchange and return of cars shipped thereon and for the operation of such through routes."

In 1913, in *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 I. C. C. 499, 500, in making an order requiring the establishment of through routes and joint rates for freight traffic over the lines of complainant and of defendant lines, the Commission referred to the same generally as "electrically operated railways, or what is *familiarly known as interurban lines.*"

The Commission described the lines involved as follows:

> "From the city of Indianapolis a great network of interurban lines extends in every direction, with an aggregate, as is said, of nearly 2,000 miles of track, reaching practically all the western, northern, and eastern portions of Indiana, as well as southern Michigan and western Ohio. Some twenty of these companies, with lines in the states of Indiana and Ohio, are named as co-defendants herein."

In 1915, in *Chicago, Ottawa & Peoria Railway Co.* v. *Chicago & North Western Ry. Co. et al.*, 33 I. C. C. 573, 575, in dealing with an application for the establishment of through routes and joint rates over the defendant steam lines, the Commission said:

> "Our authority upon a proper showing to require the establishment by steam railroads of through routes and joint rates with *interurban electric railroads* engaged in the interstate transportation of freight has long been settled."

In the *Electric Railway Mail Pay Case*, 58 I. C. C. 455, in which the final decision was rendered only a few months after enactment of the Transportation Act, 1920, the Commission said:

" 'There are *three kinds or classes of electric lines*, each of which is employed to some extent in carriage of the mails. They are known as urban or city lines, suburban lines, *and interurban lines.* Urban lines comprise those operating wholly within city limits.' * * * 'Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like the steam roads, so far as mail transportation is concerned. Many of them do considerable freight and express business in addition to their passenger business.' " (Italics ours.)

THE COMMISSION'S SEVERAL BUREAUS HAVE HERETOFORE CLASSIFIED THE PIEDMONT AND NORTHERN WITH THE INTERURBANS

The Commission's BUREAU OF VALUATION does not classify the Piedmont & Northern with steam railroads, but with other electric lines; and it has as yet made no valuation of the Piedmont & Northern properties (R. 142).

Likewise, the Commission's BUREAU OF STATISTICS AND ACCOUNTS classifies the Piedmont & Northern with other electric interurbans instead of with the steam lines, and takes its annual report upon forms prepared for the electrics (R. 143).

In 1920, shortly after the Transportation Act was enacted, the Commission's BUREAU OF FINANCE, through which the certificate of convenience and necessity provisions of Section 1, and the

provisions relating to issuance of securities, Section 20a, are administered, upon application of the Piedmont & Northern, held that the latter was an interurban electric railway within the meaning of that term as used in Section 20a (R. 143).

THE PHRASE "STREET, SUBURBAN, OR INTERURBAN ELECTRIC RAILWAYS," AS USED IN TRANSPORTATION ACT, 1920, HAS BEEN GENERALLY UNDERSTOOD BY ELECTRIC RAILWAY OFFICIALS, BY STATE COMMISSIONS, AND BY THE INVESTING PUBLIC TO INCLUDE ALL ELECTRICS

As bearing upon the sense in which the words "interurban electric railway" are commonly understood, perhaps nothing can be more informing than the citation of cases which have been presented to various regulatory commissions since Transportation Act, 1920, was enacted. We accordingly cite below cases wherein companies owning and operating electric railroads, many of which are beyond question in the same class as the Piedmont & Northern—and most, if not all of which, may be found within that class, if their status is to be determined as a question of fact by the Interstate Commerce Commission — have procured authority from state commissions to issue securities. None of the issues covered by the cases cited appears to have been authorized by the Interstate Commerce Commission, as reference to the reports and orders of the Commission will disclose. This list of cases is but a small part of those which

might be cited. It is, however, sufficient to show the general understanding of the term "interurban electric railway," since it is not to be believed that the securities covered by the decisions cited have been issued, and distributed to the public under the approval of these state authorities, and without the approval of the Interstate Commerce Commission, unless there has been an understanding upon the part of electric railway officials generally, and of regulatory authorities, and of attorneys advising respecting issues of stocks and bonds, and of the investing public, that the exclusion language in Section 20a covered all electric roads except those operated as a part or parts of a general steam railroad system of transportation.

Application Kansas City, Clay County & St. Joseph Railway Co., Public Service Commission of Missouri, order Nov. 24, 1920, Case No. 2777, $4,150,000. *Application Kansas City Public Service Co.*, order Oct. 16, 1926, $12,465,200, 16 Mo. P. S. C. 355; order Oct. 16, 1926, 267,009 shares no par stock, 16 Mo. P. S. C. 86. *Application Joplin, Pittsburg Railway Co.*, order Aug. 22, 1929, $200,000 common stock, $200,000 bonds, Case No. 6530-6531. *Petition of New York, Westchester & Boston Railway Co.*, Public Service Commission of New York, order May 1, 1925, $1,150,000 bonds, 1 P. S. C. of N. Y., page 49. *Applications Washington, Baltimore & Annapolis Electric Railroad Co.*, Public Service Commission of Maryland, Order No. 6174, Feb. 24, 1921, $240,000 trust certificates and $732,000 bonds, 12 P. S. C. Md. 78;

Order No. 6183, Mar. 4, 1921, $1,400,000 trust notes, 12 P. S. C. Md. 83; Order No. 6200, Mar. 15, 1921, $110,000 bonds, 12 P. S. C. Md. 92; Order No. 6400, July 29, 1921, $234,000 bonds, 12 P. S. C. Md. 239; Order No. 6431, Aug. 25, 1921, $141,000 bonds, 12 P. S. C. Md. 257; Order No. 6481, Oct. 6, 1921, $75,000 bonds, 12 P. S. C. Md. 285; Order No. 6501, Nov. 1, 1921, $66,000 bonds, 12 P. S. C. Md. 297; Order No. 6807, Feb. 21, 1922, $561,000 bonds, 13 P. S. C. Md. 61; Order No. 10470, Aug. 3, 1926, $468,900 Notes, 17 P. S. C. Md. 185. *Application Duluth Street Railway Co.*, Railroad & Warehouse Commission of Minnesota, order Mar. 31, 1924, $500,000 stock, 1923-24 report, page 26. *Application Minneapolis & St. Paul Suburban Railroad Co.*, order Oct. 25, 1928, $500,000 bonds, Minnesota Railroad & Warehouse Commission Report 1927-28, page 194. *Application Minneapolis Street Railway Co. and St. Paul City Railway Co.*, order Dec. 7, 1927—Minneapolis Company $12,037,000 bonds, and St. Paul Company $5,963,000 bonds, Minnesota Railroad & Warehouse Commission Report 1927-28, page 195. *Applications United Electric Railways Co.*, Public Utilities Commission of Rhode Island, order Feb. 16, 1921, $5,000 stock, No. 575, P. U. C. R. I. Rep. 1921, p. 60; order June 22, 1921, $1,000,000 bonds, Order No. 594, P. U. C. R. I. Rep. 1921, pages 76-89; order Oct. 25, 1921, $280,000 stock, P. U. C. R. I. Rep. 1921, pages 122-126; order Dec. 24, 1923, $450,000, P. U. C. R. I. Rep. 1923, p. 61; Order No. 594, $10,599,000 bonds, P. U. C. R. I.

Rep. 1921, pages 76-89, inclusive; Order No. 628, $90,000 bonds, P. U. C. R. I. Rep. 1921, pages 124-126. *Application of San Francisco-Sacramento Railroad Company.* Order No. 10955, Sept. 7, 1922, $200,000 bonds, 22 Railroad Com. Calif. 267. *Application of Sacramento Northern Railroad et al.;* order Oct. 18, 1921, $995,000 stock, 20 Railroad Com. Calif. 679. *Applications of San Francisco-Oakland Terminal Railways;* order June 7, 1920, $124,279.04 notes, 18 Railroad Com. Calif. 291; order June 9, 1922, $600,000 notes, Vol. 21, p. 777. *Applications of Key System Transit Company;* order Dec. 14, 1923, $11,451,010.08 bonds, $16,341,082.80 stock, 24 Railroad Com. Calif. 231; order June 15, 1925, $500,000 bonds, Vol. 26, p. 610; order Feb. 3, 1926, $2,500,000 bonds, Vol. 27, p. 529; order Dec. 13, 1926, $1,500,000 bonds, Vol. 29, p. 33. *Application Kansas City, Kaw Valley & Western Railroad,* Public Service Commission of Kansas, No. 9465, Oct. 1, 1927, 12,000 shares no par stock. *Application Androscoggin & Kennebec Railway Co.,* Public Utilities Commission of Maine, Order No. U-405, Mar. 4, 1920, $845,000 bonds. *Application Aroostook Valley Railroad Co.,* Public Service Commission of Maine; order No. U-628, Nov. 3, 1922, $125,000 bonds. *Applications of Chicago, South Shore & South Bend Railroad,* Nos. 15269, 16422, 17426, Illinois Commerce Commission; authorization order No. 1735, June. 25, 1925, $4,000,000 bonds, 150,000 shares no par stock; authorization order No. 1853, June 30, 1926, $1,060,000 equipment

trust certificates; authorization order No. 1949, June 30, 1927, $710,000 equipment trust certificates. *Applications of Aurora, Elgin & Fox River Electric Co.*, Nos. 12129, 13627, 14605, Illinois Commerce Commission; authorization order No. 1290, Mar. 2, 1922, $5,000 stock; authorization No. 1527, Nov. 28, 1923, $5,000,000 stock; authorization No. 1654, Jan. 14, 1925, $1,800,000 bonds. *Applications of Chicago, Aurora & Elgin Railroad Co.*, Nos. 12432, 12743, 13374, 14656, 16027, 17117, Illinois Commerce Commission; authorization No. 1329, July 13, 1922, $1,050,000 bonds; authorization No. 1363, Oct. 26, 1922, $470,000 equipment trust certificates; authorization No. 1490, July 11, 1923, $300,000 bonds; authorization No. 1650, Dec. 23, 1924, $1,000,000 bonds; authorization No. 1808, Feb. 9, 1926, $19,500,000 stock, $5,000,000 bonds; authorization No. 1920, Mar. 16, 1927, $460,000 trust certificates. *Illinois Traction, Inc.*, Nos. 13113, 13677, 14249, 14611, 15187, 15903, 16864, Illinois Commerce Commission; authorization No. 1464, May 17, 1923, $27,237,100 stock, $7,500,000 bonds; authorization No. 1521, Nov. 21, 1923, $895,000 bonds; authorization No. 1608, July 24, 1924, $737,000 bonds; authorization No. 1643, Dec. 3, 1924, $1,420,000 bonds; authorization No. 1727, June 11, 1925, $726,000 bonds; authorization No. 1796, Dec. 23, 1925, $1,000,000 bonds; authorization No. 1895, Dec. 1, 1926, $878,000 bonds. *Applications Winona Railroad Co.*, Nos. 7616, 7701 and 9181; order June 7, 1924, $600,000 bonds, 10,000 shares

no par stock, Indiana Pub. Service Com. Order Book, Vol. 32, p. 338; order Aug. 15, 1924, $90,000 notes, Vol. 33, p. 356; order Dec. 30, 1927, $260,000 notes, Vol. 46, p. 393. *Application Terre Haute, Indianapolis & Eastern Traction Co.*, No. 7729; order Aug. 28, 1924, $425,000 notes, Indiana Pub. Service Com. Order Book, Vol. 33, p. 420. *Applications Indiana Service Corporation*, Nos. 6836, 6910, 7410, 7695, 7650, 8042, 8156, 8919; order Jan. 12, 1923, $750,000 bonds, Indiana Pub. Service Com. order Book, Vol. 27, p. 143; order Jan. 26, 1923, $400,000 bonds, Vol. 27, p. 212; order Dec. 21, 1923, $672,000 bonds, Vol. 30, p. 415; order Sept. 13, 1924, $460,000 bonds, Vol. 33, p. 494; order Aug. 2, 1924, $661,760 bonds, Vol. 33, p. 234; order May 23, 1925, 21,480 shares common stock, Vol. 36, p. 315; order Aug. 2, 1926, $740,000 preferred stock, Vol. 37, p. 264; order Sept. 8, 1926, 40,000 shares common stock; order Aug. 22, 1925, $2,790,000 preferred stock, Vol. 37, p. 264; order Apr. 16, 1927, 12,100 preferred stock and 50,000 shares common stock, Vol. 44, p. 66. *Application Southern Indiana Gas and Electric Co.*, No. 4309, Public Service Commission of Indiana; order Apr. 1, 1921, $1,420,000 bonds; order Feb. 1, 1924, 750,000 debentures. *Applications Chicago, South Shore & South Bend Railroad*, Nos. 8105, 8558, and 8999, Public Service Commission of Indiana; order June 26, 1925, $4,000,000 bonds, Indiana Pub. Service Com. Order Book, Vol. 36, p. 500; order July 2, 1926, $1,060,000 trust certificates, Vol. 41, p. 38; order July 21, 1927,

$710,000 trust certificates, Vol. 45, p. 164. *Applications Milwaukee Electric Railway and Light Co. and Milwaukee Light, Heat and Traction Co.*, Railroad Commission of Wisconsin; order Oct. 25, 1920, No. S. B. 1563, $1,090,000 notes; order June 16, 1921, No. S. B. 1657, $1,000,000 bonds; order June 21, 1921, S. B. 1677, $3,000,000 stock; order April 28, 1922, S. B. 1772, $3,000,000 stock; order Oct. 3, 1922, S. B. 1822, $12,500,000 bonds; order Oct. 13, 1922, S. B. 1825, $4,160,000 bonds; order Mar. 2, 1923, S. B. 1864, $3,000,000 stock; order May 11, 1923, S. B. 1885, $1,000,000 notes; order Sept. 7, 1923, S. B. 1914, $10,000,000 bonds; order Sept. 7, 1923, S. B. 1916, $5,257,500 bonds; order Dec. 17, 1924, S. B. 2034, $1,000,000 stock; order July 18, 1925, S. B. 2062, $700,000 stock; order Dec. 14, 1925, S. B. 2129, $3,300,000 stock, $2,000,000 notes; order Jan. 19, 1926, S. B. 2140, $3,750,000 stock; order April 13, 1926, S. B. 2170, $2,000,000 bonds; order April 27, 1926, S. B. 2171, $9,800,000 bonds; order June 25, 1926, S. B. 2196, $4,000,000 stock; order Dec. 17, 1926, S. B. 2232, $2,000,000 stock; order April 19, 1927, S. B. 2256, $3,000,000 stock; order May 24, 1927, S. B. 2267, $5,819,000 bonds; order Oct. 11, 1927, S. B. 2289, $1,000,000 stock; order Oct. 14, 1927, S. B. 2291, $2,000,000 stock, $2,500,000 bonds; order Nov. 30, 1927, S. B. 2297, $1,737,000 bonds; order Dec. 24, 1927, S. B. 2304, $2,000,000 stock; order April 4, 1928, S. B. 2323, $2,000,000 stock; order May 23, 1928, S. B. 2340, $6,300,000 stock; order Jan. 15, 1929, S. B. 2377, $10,000,000 bonds. *Applications*

Wisconsin Public Service Corporation, Railroad Commission of Wisconsin; order Oct. 3, 1922, S. B. 1817, $3,200,000 stock, $3,546,000 bonds; order Sept. 22, 1922, S. B. 1821, $1,949,000 bonds; order Jan. 28, 1924, S. B. 1948, $340,000 bonds; order Jan. 28, 1924, S. B. 1947, $350,000 stock, $730,000 bonds; order Aug. 29, 1924, S. B. 2011, $95,000 stock, $207,000 bonds; order Sept. 17, 1924, S. B. 2012, $3,555,000 bonds; order Jan. 24, 1925, S. B. 2045, $327,000 stock; order Feb. 2, 1925; S. B. 2045, $328,000 stock, $983,000 bonds; order Feb. 18, 1925, S. B. 2052, $500,000 stock; order April 14, 1925, S. B. 2068, $500,000 stock; order Dec. 22, 1925, S. B. 2130, $2,750,000 bonds; order Dec. 29, 1925, S. B. 2130, $250,000 bonds; order July 13, 1926, S. B. 2190, $1,850,000 stock; order Sept. 24, 1926, S. B. 2202, $2,500,000 notes; order Feb. 10, 1927, S. B. 2202, $2,500,000 stock; order March 1, 1927, S. B. 2247, $1,750,000 stock; order Aug. 16, 1927, S. B. 2282, $1,000,000 stock; order Nov. 11, 1927, S. B. 2292, $4,000,000 stock, $6,000,000 bonds; order Feb. 23, 1928, S. B. 2314, $2,000,000 stock; order June 14, 1929, S. B. 2400, $1,000,000 stock. *Applications Chicago, North Shore & Milwaukee Railroad Co.,* Railroad Commission of Wisconsin; order June 27, 1923, S. B. 1894, $11,500,000 stock, $2,700,000 notes; order Oct. 25, 1924, S. B. 2024, $1,000,000 stock; order Dec. 12, 1924, S. B. 2033, $7,000,000 bonds; order April 30, 1925, S. B. 2077, $2,500,000 bonds; order April 30, 1925, S. B. 2078, $2,000,000 stock; order April 30, 1925, S. B. 2079, $450,000 bonds;

order Dec. 9, 1925, S. B. 2121, $1,500,000 stock; order Feb. 5, 1926, S. B. 2143, $730,000 notes; order May 3, 1926, S. B. 2176, $1,000,000 stock; order May 3, 1926, S. B. 2177, $1,250,000 bonds; order Sept. 9, 1926, S. B. 2213, $1,500,000 bonds; order Feb. 7, 1927, S. B. 2246, $2,500,000 notes; order Nov. 11, 1927, S. B. 2296, $804,000 equipment trust certificates; order May 22, 1928, S. B. 2334, $2,684,200 stock; order April 26, 1929, S. B. 2391, $2,000,000 notes; order April 26, 1929, S. B. 2392, $2,200,000 bonds; order July 2, 1929, S. B. 2398, $1,000,000 stock.

CONGRESS HAS OFTEN USED THE TERM "INTERURBAN" IN A LIKE MANNER

In various acts of Congress the electric rail carriers have been differentiated from steam railroads, and the term "interurban electric" has been used to describe all such electrics as were not covered by the terms "street electric" or "suburban electric."

The first specific reference to electric railways made by Congress was in the Act of June 18, 1910, 36 Stat. 239, 551, 552, which provided that "the Commission shall not * * * establish any through route classification or rate between street electric passenger railways, not engaged in * * * transporting freight in addition to their passenger and express business, and railroads of a different character." This provision, with immaterial amendments, was re-enacted as Section

15, Paragraph 3 of the Transportation Act of 1920, 41 Stat. 485.

On March 21, 1918, Congress passed the Federal Control Act, providing for the administration of transportation systems taken over by the President, and for the compensation to be paid for their use. The short line railroads had been anxious to be included among the railroads taken over, and had procured the inclusion of a paragraph in Section 1 of the Act declaring that every railroad (with certain exceptions) should be considered as within federal control. Congress did not then see fit to extend the benefits of the provision to all electric railroads. It accordingly made the paragraph subject to the following proviso:

> "Provided, however, That nothing in this paragraph shall be construed as including any *street or interurban electric railway* which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both."

Here Congress desired to grant to carriers of the class to which the Piedmont and Northern belongs, that, is to electric carriers the principal business of which was freight transportation, the benefit of inclusion under federal control, and it desired to exclude electric carriers whose main business was something else than freight transportation. The manner in which it proceeded to

act showed clearly that it considered that the term "interurban electric railways" included electric carriers *the principal business of which was freight transportation.* It accordingly used apt language to distinguish between those carriers and other carriers of the same class.

The Government, through the Railroad Administration, interpreted the term "interurban electric railway," as used in the above-quoted portion of the Federal Control Act, as including carriers electrically operated although the character of the freight service supplied by them was the same in all essential respects as that supplied by steam railroads. It excluded such carriers from the benefits of the legislation in question except only when they could show that the major portion of their operating revenue was from freight business. The fact of this interpretation of this term "interurban electric railway" was directly presented to the committee in evidence at the hearings on the bills which finally became Transportation Act, 1920, as will be pointed out later in this brief.

Congress next dealt with electric railroads in legislation relating to Railway Mail Pay, in the Post Office Department Appropriation Act of July 2, 1918 (40 Stat. L. 748), wherein it provided:

> "That the Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from to time the fair and reasonable rates and compensation for the transportation of

mail matter by *urban and interurban electric railway common carriers.*"

Under this Act the Commission instituted an investigation, and *it treated as falling within the provisions of the statute all electric roads, regardless of the extent and character of their freight service.* This investigation was begun July 26, 1918. The issues were submitted in 1919, and a final report was made in August, 1920. *Electric Railway Mail Pay*, 58 I. C. C. 455.

In this last mentioned Act, therefore, the Congress, less than two years before Transportation Act, 1920, was passed, had directed action by the Commission with respect to "interurban electric railways," using those words as descriptive of *all electric railways other than urban electrics*," and the Commission had interpreted the legislation as including all of *that entire class*, irrespective of the amount or character of freight service supplied by them, in the same manner as the United States Railroad Administration, in dealing with like carriers, interpreted like language in the Federal Control Act.

From the foregoing it will be seen that many years before Transportation Act, 1920, was passed the term "interurban" had come to be applied to electric roads to include those not classed as street or suburban roads. That such use was common in 1911 is shown by the fact that the Interstate Commerce Commission then referred to those roads as "*that class of roads commonly referred to as inter-*

urban roads." This constituted express recognition by the Commission at that time of the common public use of the term in that sense.

To summarize what has been said: prior to the enactment of Transportation Act, 1920, the term "interurban electric,—as descriptive of electric lines generally, other than local roads properly classified as street or suburban,—was used (1) commonly by the public; (2) by the United States Railroad Administration, engaged in the operation of both steam and electric carriers under federal control; (3) by the several bureaus of the Interstate Commerce Commission, and by the Commission itself in its formal reports; (4) by the Congress; and (5) by this Court.

This general and uniform use of the term "interurban electric" in a definite and well recognized sense would seem to require that it be taken to have been used in that sense by the Congress when it incorporated the same in paragraph (22) of Section 1, now under consideration.

If, however, the usual meaning of the term is deemed subject to variation upon consideration of other parts of the statute in which said paragraph (22) is found, and of all the circumstances of the enactment of that paragraph, and if we proceed to such consideration, we shall not only find no necessity for such variation, but instead shall find confirmation amounting to demonstration that Congress must have intended to use the term in its commonly accepted sense.

PARAGRAPH (22) WAS INSERTED BY CONGRESS IN RESPONSE TO REQUESTS FOR THE EXCLUSION OF ALL ELECTRICS

The inclusion by Congress of paragraph (22) in Transportation Act, 1920, was in direct response to requests for the exclusion of all electric roads from the scope of the new legislation contained in that Act.

Transportation Act, 1920, was the outgrowth of bills introduced by the respective chairmen of the House Interstate and Foreign Commerce Committee and the Senate Committee on Interstate Commerce. It was the product of the work of those committees. Those members of the committees who were responsible for the form the bill finally took were familiar with the language of the Act to Regulate Commerce, which Transportation Act, 1920, amended to its present form and title. They were familiar with former amendments. They were familiar likewise with other then recent railroad legislation, such as the Federal Control Act. They, of course, intended that, so far as Transportation Act, 1920, amended the Act to Regulate Commerce, such amendments should be harmonious with other portions of that Act, in the sense that words and phrases used in such amendment should be used in the same sense as in other parts of the Act, and in such other recent legislation. It is for this reason that every such amendment, under established rules of construction, will be read in the light of the Act as a whole.

The bill which was introduced by the Chairman

of the Senate Committee was the Cummins Bill, S. 2906, and that introduced by the Chairmany of the House Committee was the Esch Bill, H. R. 4378. The Cummins Bill had been framed on the basis of hearings held by the Senate Committee on Extension of Federal Control. No hearings were held on that bill after it was introduced. In the House extended hearings were held on the Esch Bill, and some of the evidence and statements made in that hearing referred to the Cummins Bill.

Involved in the bills were provisions which brought opposition to the application of them to electric railroads from different groups and for different reasons. Such opposition was made for the express purpose of procuring inclusion of language which should wholly exclude electric lines from the operation of the proposed new legislation.

The electric railroads themselves, and numerous business organizations in southern California, where electric interurban development in the field of freight transportation had been of especial importance, objected to the application of proposed legislation respecting labor disputes.

The state regulatory commissions objected to the application to electric carriers of the provisions respecting securities issues and certificates of convenience and necessity covering new construction and abandonment.

The significant facts are, first, that these three groups, one representative of the electric railroads

themselves, another representative of associations of business men, and another of the state officials charged with the regulation of electric roads, all used the term "interurban electric" in the sense which we have heretofore shown to have been common, as embracing all electric roads other than street and suburban lines, and, second, the further fact that in asking for the elimination of all electric roads from the application of the proposed new legislation they presented language designed to accomplish that purpose which was identical with, or substantially identical with, that adopted by the committee, and incorporated in the sections relating to the matters as to which these groups were concerned.

THE REQUEST OF THE ELECTRIC RAILROADS

The request of the electric railroads was presented by the American Electric Railway Association in the form of a letter, which had been written to Senator Cummins relating to S. 2906. It is printed on page 3418 of Volume III of Hearings Before the House Committee on Interstate Commerce on H. R. 4378, the Esch Bill. It contains the following statements:

> "Sir: We, a committee of the American Electric Railway Association, representing more than 80 per cent of the electric railway mileage in the United States, desire to call your attention to Senate Bill 2906.
> * * *
>
> "The distinction between steam and elec-

tric interurban roads is well known and is constantly recognized by the courts, Congress, and the several State legislatures in dealing with the transportation question. Upward of 60 per cent of all electric railway mileage in the country is strictly city mileage, and not to exceed 5 per cent of the gross earnings of all electric railways, city, suburban, and interurban, is derived from interstate traffic.

"No one will contend that city electric railways are to be classed, for purposes of operation, with steam railroads. The *interurban electric railways* are, to a large extent, affected by their local surroundings; they must depend *largely* upon revenue earned from local communities served, and they are affected to a greater extent by the competition of motor vehicles; they must be considered by themselves. * * *

"To have the wages and working conditions of electric railway employees under the jurisdiction of, and fixed by, a body that passes upon like questions for steam railroad employees can but be disastrous to the electric railway industry. The action of such a body would be certain to be dominated by the ideas of steam railroad employees, and would be likely to result in onerous burdens being placed upon the electric railways, possibly beyond the ability of the communities and companies to bear.

> "To carry out the ideas expressed, *we have prepared, and present herewith proposed amendments to the pending bill, which would exclude all electric railways* from all the provisions of the bill, except only those sections which simply amend the interstate commerce law." (Italics ours.)

The sections of the Cummins Bill referred to as "those which simply amend the interstate commerce law" did not relate to labor, securities, or certificates of convenience and necessity. The new section proposed was designed to prevent the application to electric railroads of any sections dealing with those new matters, and was as follows:

> "None of the provisions of this act, except sections 33 to 38, both inclusive, and sections 40 to 47, both inclusive, shall apply *to so-called 'street, suburban, or interurban electric railways.'* "

THE REQUEST OF THE ASSOCIATION OF BUSINESS ORGANIZATIONS

The request of the association of business organizations is found also in Volume III of the Hearing on H. R. 4378, at page 3552. It is in the form of a letter from the Secretary of the Association, accompanied by a resolution adopted by the Association. The letter is quoted in full and the resolution in part, as follows:

> "Dear Sir: Inclosed herewith you will find

six copies of resolutions passed by the board of directors of the Association of Business Organizations of Los Angeles, at meeting held September 3, 1919. This relates to legislation relative to control of railroads, and specifically requests that because of the entirely different operating and other conditions the electric railways be eliminated from legislation affecting steam railroads. The Association of Business Organizations of Los Angeles is a central organization representing 22 principal commercial organizations named in the attached resolutions of business organizations. Yours truly."

"Resolved by this association, That it request the Congress of the United States *to eliminate altogether* from any legislation relating to the future control and operation of the steam lines *the interurban and street car systems* other provisions than those which may affect them incidentally with reference to interstate freight rates and passenger fares to the extent that they are engaged in interstate commerce." (Italics ours.)

THE REQUEST OF STATE REGULATORY COMMISSIONS

On behalf of the National Association of state regulatory commissions a statement was made by Hon. Charles E. Elmquist, its General Solicitor.

Discussing the section relating to certificates of convenience and necessity, he presented, in the form of a proviso, what finally became paragraph (22), here under consideration. This proviso, as presented, is found on page 1611 of Volume II of the Hearing on H. R. 4378, as follows:

> "Insert at the end of Section 2, line 15, page 11, the following:
>
> " 'Provided, That the authority of the Commission conferred by this section shall not extend to the construction of sidetracks, spur, industry, team or switching tracks, *street car and electric interurban lines*, or to extensions of lines of steam railroads or to the construction of new lines to be located wholly within one state.' "

Discussing this proposed amendment, at page 1613, Mr. Elmquist said:

> "The same amendment refers to electric interurban lines. There are a great many electric interurban lines, the *average* length of which in this country is about 48 miles. *Generally speaking*, they perform a local service under the laws of the State. They are subject to the regulatory powers of the local commissions. We can see no good reason for transferring to the Interstate Commerce Commission the power to determine

> the extension or the abandonment of those lines which are specially designed to take care of local service." (Italics ours.)

Discussing the section giving the federal commission control over securities issues, Mr. Elmquist asked for the inclusion of another proviso, which appears on page 1629, as follows:

> "Provided, That the provisions of this section shall not apply to *street car companies or electric interurban companies.*"

In support of this request Mr. Elmquist said:

> "The conference gave a great deal of consideration to the question of security control. We recognized the force of the argument that has been repeatedly made before Congress, that there is a real evil in requiring a railroad which operates through several States to go to several different commissions with security applications. * * *
>
> "We believe, therefore, that this Congress should place the general control of security issues in one Federal body, whereby these larger companies can at one time secure an issue under proper legal safeguards. We do not believe that the same evil exists in connection with *interurban lines or street car lines.*"

It will thus be seen that the electric railroads themselves, business men's organizations, and the state regulatory authorities asked that electric lines be excluded from the operation of provisions of law granting new powers to the Interstate Commerce Commission. Nobody asked that they be subjected to the new legislation. It will be seen also that these several groups used the term "interurban electric railway" as descriptive of a class embracing all the electrics except local lines classed as "street" or "street and suburban."

Later in this brief we will show that the Congress incorporated in various sections of the Transportation Act, 1920, substantially the exact language which was thus presented to it, avowedly designed to exclude all electric lines from the operation of the new legislation proposed, but that it incorporated the same with certain limiting phrases added, the effect of which was to withhold from the exclusion requested any electric line "operated as a part or parts of a general steam railroad system," and so as to withhold from the exclusion of Section 15a all freight-carrying electrics. The occasion for the limitation relating to the provisions of Section 15a will be now adverted to. It is of the utmost significance and compels the conclusion that Congress was well aware when it used the term "interurban electric" that it included freight-carrying electrics which interchanged traffic with steam lines, and conducted their business in substantially the same manner as the steam roads.

CONGRESS USED THE TERM "INTERURBAN ELECTRIC" WITH OBVIOUS INTENT THAT IT SHOULD INCLUDE ROADS OF THE TYPE OF THE PIEDMONT AND NORTHERN

Representatives of a few electric railroads appeared before the House Committee and complained of their exclusion from federal control by the provisions of the Federal Control Act, already quoted, which excluded "interurban electric railways," the principal source of the revenue of which was not freight transportation. Representatives of these lines asserted that they did the same character of freight business as steam railroads and that if they were enabled to enjoy the same rates as the roads under federal control they would derive the major part of their revenue from freight transportation, but that they were, by the Railroad Administration, refused the benefit of federal control because of the provision of the Federal Control Act, that it should not apply to any "interurban electric railway" if its principal source of operating revenue was other than freight transportation.

These carriers asked the committee to take care of them by such language in the rate-making provision of the new legislation, as would enable them to receive the same treatment as to rates as the steam railroads.

By these complaints and requests the Congress had thrust upon its attention the interpretation which the Government, through the Railroad Administration, had placed upon the phrase "inter-

urban electric railway." Congress knew that it was interpreted as including freight carrying electric roads, which carried on their freight business in the same manner as steam railroads. To show how clearly this was brought to the committee's attention, we quote from the statement of Mr. Ben B. Cain, at page 1880, Volume II of the Hearing on H. R. 4378:

> "They have electric locomotives and car equipment just like the other lines and physical connections, so that they handle the transportation of the steam lines just as the steam road does. They have their turnouts and their depots and everything else built for that purpose, and the exclusion of those roads is to penalize the highest character of construction. Of course they have been excluded from the operation of the short-line contract because of a proviso in section 1 of the act of March 21, 1918, which excluded all electric interurban railroads the principal source of whose tonnage might be passenger business. * * * That is the language of the act, and they are excluded on account of the literal application of the terms of the act, I think, rather than the spirit of the act, but that has been the ruling of the Railroad Administration."

We also quote from the testimony of Mr. J. D. Cornell, at page 1947, Volume II of the Hearing on H. R. 4378:

"I represent the Joplin & Pittsburgh Railway and the Kansas City, Kaw Valley & Western Railway, both of which are electrically operated railroads.

"My particular purpose here is to impress upon your committee the vital importance of the construction of the words 'interurban railway.' I will bear first upon the properties that we have at the present time operating between Kansas City, Mo., and Lawrence, Kans.; the Kansas City, Kaw Valley & Western Railway, a distance of 42 miles, under construction at the time of the war, suspended on account of the war, with a charter as a regular railroad to operate between Kansas City and Topeka, a distance of about 67 miles, and the ultimate idea of extending on to Manhattan, Kans.

"This line was chartered as a regular railroad under the railroad act of the State of Kansas; was constructed for heavy traffic, with a maximum grade of less than 2 per cent; has sidings to accommodate from 30 to 50 freight cars; interchanges carload freight with all connections at Kansas City, and through Bonner Springs and Lawrence, Kans., with the trunk lines; has working arrangements, through rates, and through billing arrangements with all lines through Kansas City, and it files tariffs and regular reports to the Interstate Commerce Commission. * * *

"The Chairman. Your idea is that you do not believe it should be a classification based on the motive power?

"Mr. Cornell: No; and covered by the word 'interurban'. * * *"

This construction of the term "interurban electric" by the Railroad Administration, which applied it to roads of the same type as the Piedmont and Northern, was accordingly well known to Congress, being thus forcibly thrust upon its attention at the very moment it was framing Transportation Act, 1920. Nevertheless Congress used the same term again. It must therefore have approved and adopted the construction, as expressing the sense in which the term was used by it. This conclusion is obvious, and is in accord with firmly established rules of construction. But there is much convincing confirmatory evidence in the manner in which Congress used the term "interurban electric" in the various provisions of Transportation Act, 1920.

First, as to new construction, we have seen that the electric railroads and the state regulatory authorities and various organizations of business men asked that all electric lines be eliminated from the scope of such new legislation as should be contained in the bill. Nobody asked that they be included. The Congress in Section 1 used the exclusion language which had been recommended by the electric railroads themselves,—but with a qualification. Exclusion by paragraph (22) was

extended to "street, suburban, or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transportation.*"

Does not the very limitation so added,—"which are not operated as a part or parts of a general steam railroad system of transportation"—indicate a clear perception by Congress of the all-inclusive character of the description "street, suburban, or interurban electric railways"? Is it not apparent that, while disposed to comply with the request made that the electrics generally be excluded, and while using for that purpose the excluding language presented by the electric lines, Congress nevertheless designed to modify, and did so modify, such recommended language as to prevent any steam railroad system from using an electrically operated road as a means of escaping from the jurisdiction of the Commission designed to be imposed by the Act? And does not the fact that it deemed such modifying language necessary show that it understood the language as presented to it to embrace all the electric lines, as was expressly designed, and stated to the Congress by those who framed it?

Second, as to regulation of securities issues. The same groups which had asked exclusion of all electrics from the provisions relating to construction and abandonment asked their exclusion also from the provisions which became Section 20a. And the Congress granted exclusion to the same extent and by the same language as was used in Section 1.

Third, as to labor disputes. The electric railroads asked that they be not brought under the labor provisions, and the Congress, in Section 300, granted exclusion to the same extent, and by substantially the identical language used in Section 1, such language being as follows: "except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

Fourth, as to the rate-making provisions, which became Section 15a. Certain freight carrying electrics had earnestly contended that they were entitled to receive the same rate-making treatment as Congress granted to the steam roads, as we have shown by evidence offered before the committee. They asked that the rate making provisions of the bill should be made applicable to them. And Congress granted what they wanted. The exclusion language of Section 15a was varied so as to exclude only street and suburban electric railroads not operated as a part of a general steam railroad system, and interurban electrics not engaged in the general transportation of freight. The exclusion language was as follows:

> "excluding * * * (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight.*"

Fifth, in Section 204 of Transportation Act, 1920, providing for the reimbursement of deficits during federal control out of the Federal Treasury, the Congress used still different exclusion language, as follows:

> "The term 'carrier' * * * does not include any street or interurban electric railway which has as its principal source of operating revenue, urban, suburban, or interurban passenger traffic or sale of power, heat and light, or both."

Section 209, providing a guaranty to carriers after termination of federal control, contained exclusion language closely similar to that of the related Section 204, as follows:

> "The term 'carrier' * * * does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both."

The discriminating care with which, as has been shown, Congress adapted the language of these various sections of the Act to accomplish complete exclusion where complete exclusion was desired, and to include freight carrying electrics where in-

clusion of such freight carriers was desired, and to include such electrics when their principal business was freight transportation, where that only was desired, compels the conclusion that Congress understood the term "interurban electric railway" as descriptive of a class, and intended it to include all of that class regardless of the amount and character of freight traffic transported by any.

If the term "interurban electric railway," as used in various parts of Transportation Act, 1920, is given the meaning in which it was commonly used by the United States Railroad Labor Board, the bureaus of the Interstate Commerce Commission, and the Commission itself, by this Court and by the public, the question as to what roads the respective portions of the Act apply to will be easy of determination, but if the question whether a road is or not an interurban depends upon the quantity and interchange character of the traffic it transports, and the manner in which its business is conducted, nobody can know whether any particular portion of the Act applies to a particular road except after a hearing and final decision covering that road by the Commission, or by the Court, if the Commission's decision be contested.

This is obviously true of the provisions relating to construction and abandonment, securities issues, and labor disputes; and it is true also of Section 15a. All of the roads which engage in the general transportation of freight are subject to the provisions of Section 15a, but not all electrics engaged exclusively in the transportation of pas-

sengers are necessarily excluded if decision as to interurban status depends upon business done. If they interchange passengers with connecting steam roads, and do important business, they may be held by the Commission something more than interurbans, and hence not within the exclusion language of Section 15a. Only a trial of the issue can determine in each case.

Likewise, if business was the deciding factor as to interurban status, the guaranty section was uncertain of application. The exclusion, in that section of interurbans the major part of the income of which was derived from something else than freight transportation, instead of being clear and definite, as the Railroad Administration interpreted it, was quite unclear. An electric carrier, which did an important passenger business, interchanging passengers with other lines, might be held something more than a "street, suburban or interurban railway," and hence not within the exclusion language.

Can Congress have designed to leave this question of guaranty in any such uncertainty?

Can it have intended that passenger carrying roads might come under Section 15a and under the guaranty section?

Can it have intended that some of the electrics should be under the Labor Board and some should not be?

Can Congress have intended that companies desiring to build extensions or to issue securities should be left uncertain as to whether they must

proceed under federal or state laws, with no manner of determining except by instituting proceedings before the Commission, and trying the issue? Can Congress have intended that state authorities should be left wholly unable to determine whether any particular carrier remained or not subject to state jurisdiction as to such construction or securities issues?

THE COMMISSION AND THE COURT BELOW HAVE ERRONEOUSLY DISREGARDED THE OBVIOUS INTENT OF CONGRESS

The Interstate Commerce Commission has undertaken no definition of the term "interurban electric railway" which will enable determination to be made whether a given road falls within that class otherwise than by a trial of a proceeding before it. Both the Commission and the court below, hold that the interurban or non-interurban character of a road depends upon the extent and distribution of its interstate business, and the interchange relations maintained by it with other carriers. They are plainly of the opinion that a carrier may be an interurban at one time and by development of its business may lose that character. If this be so, logically a falling off in its business or some change in its methods of operation may cause it again to change its character, and cause its return again back into the excepted class.

In this way, a given road may, with the mere variation of its business, pass back and forth between state and federal jurisdiction. Whatever

it may think its status, and however scrupulously according to law it may seek to proceed, it will never be possible to be entirely certain that its construction is not unlawful, and its security issues void. And state authorities will never know when it is their duty to insist upon compliance with state law, and when they are without power to insist.

It would be unbelievable that the Commission and the court below contemplated any such shifting jurisdiction, had that fact not been made clear beyond misunderstanding by language which will be quoted below.

It, of course follows, from the Commission's decision that whether a given road is or not an interurban must depend upon the uncertain event of the Commission's judgment upon the facts respecting the business of that road. It is necessary, however, to go to the Commission's brief filed in the court below to discover language clearly recognizing that the "interurban" character of a road is something which may appear and disappear with the mere increase or decrease of the volume of its business, and with the increase or decrease of the area from which it draws or to which it sends traffic, and with changes in its methods of operation and its business relationships with other roads.

The Commission recognizes, as it must, that the provisions of Section 15a which subject interurbans to the provisions of that section, if engaged in the general transportation of freight, must be taken to show that electric lines may be freight-

carrying lines, and yet be interurbans, and hence not subject to the jurisdiction of the Commission as to new construction.

Strangely enough, however, the Commission refuses to take note of the fact that in Section 204 of the Act, the so-called guaranty section, the Congress excluded from the benefit of the guaranty interurban electric railways the principal source of revenue of which was not freight traffic. This exclusion would seem to make it obvious that the "interurban electric railways," covered by that section, were all of them freight carrying electrics the principal business of which was transportation of freight.

To be successful, such freight carrying electrics must of course, have standard tracks and equipment, and must interchange business with connecting lines under through rates. Indeed, under the law it is the duty of every carrier subject to the Act to establish through rates and through routes whenever needed. Efficient methods of operation, well-established relationships with connecting roads, free interchange of traffic, and the movement of traffic originating in, or destined to, points throughout a widespread area are but the indicia of any successful railroad, the principal business of which is freight transportation. And we have seen from the provisions of Section 204 of Transportation Act, 1920, that such roads may be interurban.

Disregarding this, the Commission based its decision denying the status of an interurban to the

Piedmont & Northern upon the fact that it had these characteristics. In its brief in the court below the Commission in effect contended that an interurban ceases to be an interurban when it builds up a substantial interstate business, or, in other words, by reason merely of its success, as will appear from the following quotation from that brief:

> "Unquestionably some weight must be given to the difference in language of the excepting clause of section 15a and that of section 1 (22), herein under construction, namely, to the fact that, while under the express language of the former electric interurbans are not excluded if they are engaged in general transportation of freight, this is not true of the language of the latter. But it does not follow that the force to be given the difference in language should be of unlimited scope. The reason for the difference in language seems very clear. While an electric interurban, which has, in connection with its local business, *built up a considerable interstate freight business*, should, for the sake of uniformity in rates, be included in the general rate adjustments provided for in section 15a, still if its principal and primary business *continued to be* the purely local carriage of passengers and small freight, the extension of its lines and facilities for such purposes likewise re-

> mained matters chiefly of local concern and should be left to local authority. But where, as here, the physical railroad, as linked up by the proposed extensions, will cross state lines and where, as here, the usual electric interurban passenger business is of minor importance, the exclusively local passenger and freight business is a small proportion of the whole and the avowed purpose of the extension of lines *is to assure petitioner of a strong position as a participant in through traffic* with large trunk line railroads (Petition, p. 13), the local interest in the new extensions certainly does not measure up to the federal interest in what would obviously be a new link in the chain of the country's interstate railroads.
>
> "To attribute greater weight than the above to said difference in language seems impossible." (Italics ours.)

This contention was accepted by the court below, and carried into its opinion, almost in the language in which made, as appears from the following portion of the opinion:

> "The difference in language between the exception in Section 15a and the exception in Section 1, Paragraph 22, may not be ignored, but it is accounted for by the fact, that in one case Congress was dealing with rates, and in the other, with the construc-

tion of new lines. It evidently concluded that if an electric interurban road should *build up a business of transporting property to such an extent as to be engaged in the general transportation of freight*, it should be included in the general rate adjustment provided in Section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be engaged *in the local carriage of passengers and freight, as its primary business*, the extension of its line would remain a matter of local concern and should be left to the regulation of local authority. It is obviously difficult to form an exact definition of the term under discussion and to say *when the general freight business of an electric railway has become so great that it had crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute.*" (R. 246.) (Italics ours.)

If the term "interurban electric railway" as the same appears in the several parts of Transportation Act, 1920, is treated as used in the sense which we have shown it was commonly used, it will always be clear whether a given road falls within

the provisions of a certain portion of the Act or does not, and whether, with respect to construction or securities issues, it is or not subject to regulation by state authorities. If, on the other hand, the construction given to the term by the Commission and by the court below is adopted, it can never be known except as the result of litigation, and even when the status of a carrier has been settled by litigation, it may afterwards at any time change.

THE COMMISSION'S CONSTRUCTION OF THE TERM "INTERURBAN" IN THIS CASE IS INCONSISTENT WITH ITS CONSTRUCTION OF THE SAME TERM IN OTHER CASES

The court below in its opinion points out that the Commission has been inconsistent in its construction of the term "interurban."

We have seen that in 1920, directly after the Act was passed, the Commission declined to exercise control over the Piedmont and Northern as to securities issues, holding that it was excepted from the application of Section 20a as an "interurban electric."

In *Application of Section 15a to Lackawanna & Wyoming Valley Railroad*, 105 I. C. C. 178, 183, the majority of the Commission, ruling that the Commission must be governed by the language used by Congress in Section 15a, and must apply that section to *all* freight carrying electrics, said:

> *"Had Congress intended that Section 15a should be applied to only such electric lines*

as are substantially similar in their operation and traffic to steam railroads generally, it could easily have made that intention plain by appropriate language."

Quite obviously the converse is true, and if Congress had intended that electric interurbans which are substantially similar in their operation and traffic to steam railroads generally *should not be excluded under paragraph (22), Section 1, it could easily have made that intention plain by appropriate language.*

In *Application of Michigan United Railways Company*, 67 I. C. C. 452, the Commission said:

> "It appears that the line of railroad in question serves the cities of Lansing, Jackson, Battle Creek, and Kalamazoo, and adjacent territory, handling freight as well as passengers, and is electrically operated. * * * The line has physical connection with the tracks of the Pere Marquette Railway at North Lansing where interchange of freight cars is made, but is not included in the operating system of any steam carrier. * * *
>
> "*We are of the opinion that paragraph (18) of Section 1 of the act does not apply to the situation here presented, and that we are without jurisdiction to issue a certificate authorizing operation as prayed for in the application.*" (Italics ours.)

On the other hand, in *Sacramento Northern Application*, 71 I. C. C. 653, 79 I. C. C. 782, and in *Ex Parte 38*, 122 I. C. C. 414, the Commission reversed itself and denied the status of interurbans to roads similar to the Piedmont and Northern.

THE OPINIONS OF THIS COURT HAVE BEEN MISAPPLIED BELOW

The court below appears to have sustained the Commission in its classification of the Piedmont and Northern upon the supposed authority of the decision of this Court in *Texas & Pacific* v. *Gulf, Colorado & Santa Fe*, 270 U. S. 266. In that case the Santa Fe had constructed a track approximately 8 miles long wholly within the State of Texas for the purpose of reaching certain industries located upon the line of the Texas & Pacific. It claimed exemption from the provisions relating to certificates of convenience and necessity, in the Transportation Act, upon the ground that the new track constructed was an industrial track, excepted from the Commissioner's jurisdiction by the provisions of paragraph (22).

In its opinion holding that the new track was not within the exemption in paragraph (22) this Court said:

> "In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in

> forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts, by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in par. 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern.
>
> "When the clauses in pars. 18 to 22 are read in the light of this Congressional policy, the meaning and scope of the terms extension and industrial track become clear."

The court below in this case quoted this language and appears to have considered the same as establishing that if the Piedmont & Northern is doing business of such importance that an extension of its lines would have upon its competitors practically the same effect as the like extension under the like circumstances of a steam railroad, then the Piedmont & Northern can not be held an interurban.

We submit that there is a wide difference be-

tween the two cases. In *Texas & Pacific* v. *Gulf, Colorado & Santa Fe*, what the Santa Fe sought to do was to enter new territory. Its additional track was not for the more convenient service of territory already served by the Santa Fe. It was to secure the business of territory served by the Texas & Pacific. To accomplish this purpose the Santa Fe sought to avoid subjecting its proposed invasion of Texas & Pacific territory to the approval of the Commission by giving it the appearance of an industrial track. Although the new line was approximately 8 miles long, it placed no station thereon, did no passenger business thereover, and otherwise operated the same in all respects like an industrial track.

It was an attempt by subterfuge to defeat the law. Courts have regard to the substance and not the form. They pierce through a superficial appearance given any transaction to discover its true character. The effect of the Court's decision in that case was that the Santa Fe could not defeat the purpose of the law by calling an eight-mile extension into the territory of another road an industrial track, and by so constructing and operating it as to give it the superficial appearance of an industrial track.

In the Santa Fe case the court necessarily considered the use the road was to be put to, since that determined whether it fell within the exception of the statute. In the case of steam roads *all* construction is subject to the Commission's jurisdiction unless it has a certain character—and whether

it has that character must be determined by the use it is put to. On the other hand, street, suburban and interurban electric railways are exempt in their entirety, without regard to the character of their use. As to them the decisive question is, "Does the applicant *fall within the class named?*" If it does, it is exempt, regardless of the amount of business, either passenger or freight, which it may do, and of its effect upon other lines. As to steam railroads, on the other hand, the decisive question is, "What is the *character of the use* the new track is to be put to?" Hence the business to be done determines whether it is or not exempt, while it can never so determine in the case of a road falling within an excepted class.

The Commission in its brief below also cited *Spokane & Inland Empire Railroad* v. *United States*, 241 U. S. 344, and the court below evidently placed much reliance upon that case, making reference to the same as "particularly pertinent" (R.247). Its particular pertinency, however, is not easy to discover. It was a prosecution for failure to equip passenger cars with safety appliances which were required by law of carriers subject to the Interstate Commerce Act, with the exception that the requirement should not apply to "trains, cars, and locomotives which are used upon street railways." The carrier in that case operated a street railway system in Spokane and several "interurban electric lines," one of which ran from Spokane to Coeur d'Alene, on which the cars in

question were operated. "The street car business was entirely separate from that done by the interurban line, the employees of the one having nothing whatever to do with the other, and although stops were made by interurban trains within the city limits, and while on the street railway tracks, they were made solely for the purpose of taking on and letting off passengers to and from stations outside the city." The cars in question were operated in interurban trains between Spokane and Coeur d'Alene.

The defense was that because they thus operated over street railway tracks in Spokane they were "used upon street railways," and hence were within the exception. Of course, it is obvious that such a construction would have opened the way, as the Court pointed out, to the easy defeat of the purpose of the statute "since the inevitable result of sustaining the contention would be to put it in the power of a railroad, by operating a train for a trifling distance over tracks within the exception, to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute, which otherwise would be controlling." As the Court said: "The want of merit in the contentions is clear."

The case is not analogous. If the prosecution had been for failure to equip the street cars of the respondent road operating exclusively upon the streets of Spokane, upon the ground that the obvious purpose of Congress in enacting the law and

its amendments was to secure the safety of railroad employees, and that this purpose, in the case of the respondent road, would not be fully accomplished without extending the law to the street railway operations, that would have been an analogous case. It would have been an attempt to apply the law where Congress had said it should not apply, as is attempted in this case.

THERE IS NO EVIDENCE TO SUSTAIN THE COMMISSION'S FINDING THAT THE PIEDMONT AND NORTHERN IS NOT AN INTERURBAN

The evidence in this case conclusively shows that the Piedmont & Northern falls within the "interurban electric" class. The Commission itself found that it "performs an ordinary interurban passenger service." (R. 37.) The court below found that it uses the city streets largely for pick-up and delivery freight service, and that this is "*a peculiar characteristic of the Piedmont & Northern and other interurban roads*" (R. 233); that it "is even possible for electric locomotives to go inside a building, where a steam locomotive can not go"; that there "are more daily freight trains in small units"; and "more frequent stops * * * in local station-to-station movement of freight" on the Piedmont & Northern than on a typical steam road; and that there are local switches for industrial plants, "so that freight is delivered and picked up all over the line"; and that "local freight service * * * is also more flexible and convenient than that rendered by the steam railways."

(R. 234.) The chief difference "between the local freight service of the Piedmont & Northern and that of the steam railroads" consists in such use of the street railway systems to gather up and deliver freight in the cities and in the greater number of local freight stations between cities and the operation of its freight trains in smaller units with greater frequency and in the speedier delivery of local freight between nearby points (R. 234-235).

These are characteristics which mark the Piedmont & Northern as not in the steam railroad class. They are characteristics which none of the steam railroads have, but which the interurbans do have. To use language which the court below used in speaking of them, just above quoted, they are "peculiar characteristics of the Piedmont & Northern and other interurban roads." They mark the Piedmont & Northern as in the interurban class.

To take the Piedmont & Northern out of this class there is no testimony whatever. The characteristics relied upon to do that, by the Commission and by the court below, have none of them any relevancy for that purpose, because they are characteristics common both to interurban and steam railroads. These will be considered.

First. That the roadbed, rolling stock and equipment are well suited to cooperate with steam railroads in the transmission of freight to distant points.

Interurbans are subject to the Interstate Commerce Act. By paragraph (4) of Section 1 it is

made the duty of every such carrier to provide transportation (defined in paragraph (3) to include locomotives and cars and all instrumentalities and facilities of shipment) upon reasonable request therefor, and to establish through routes and just and reasonable charges applicable thereto. By paragraph (10) of said section every such carrier is required to furnish reasonable car service, including the supply, movement, and interchange of locomotives and cars used in transportation.

It seems unnecessary to argue that mere performance of its duty under the law can not change the character or status of an interurban line.

Second. That its business methods are similar in many respects to those of steam railroads, in the publication of tariffs and otherwise, and that it belongs to traffic organizations of steam roads, and that it receives and forwards freight from and to origin and destination points scattered over a broad area covering many states.

A freight carrying electric, to do a successful freight business, must adopt these methods. The adoption of them, and the movement of freight traffic received from or destined to distant points on other lines merely shows that the carrier is operating efficiently and successfully.

Third. That 92 per cent of the revenue of the Piedmont and Northern is derived from freight traffic, and only 8 per cent from passenger traffic. This is wholly insignificant unless it be first established that an interurban may not have freight

traffic as its principal source of revenue. The contrary is clear from the fact that Congress in the Federal Control Act (41 Stat. 453) and in Section 204 of the Transportation Act (41 Stat. 460) excluded interurban electrics in general, but so far only as the transportation of freight was not *their principal source of operating revenue.* This makes it clear beyond opportunity for reasonable question that some interurban electrics do derive their principal operating revenue from freight transportation.

Fourth. That only 4.75 per cent of the freight revenue of the Piedmont and Northern comes from the movement of freight not interchanged, and the remaining 95.25 per cent from freight interchanged with steam lines, and that the major part of its carload traffic is so interchanged.

These facts are also without relevancy to prove the Piedmont and Northern not an interurban. An interurban, as we have just pointed out, may be a road the principal business of which is transportation of freight. The purpose of the building of the Piedmont and Northern, "from the beginning, was to construct a line of railroad which would aid in the industrial development of the Piedmont Region and serve as a means by which mills and factories could find connections with the steam railroads of the country for the delivery of freight." (R. 235.) It was designed as a freight carrying road. It was to supply the flexible service peculiar to an interurban, of picking up and delivering freight at the factory door. It was to promote an intense in-

dustrial development. Its freight naturally would be carload freight moving principally from or to origin or destination points on steam lines located in all parts of the United States.

The more successful this road should be in its purpose to build up the industrial development of the Piedmont Region the larger the volume of its interchange freight traffic would be, and the less would be the percentage of its revenue derived from local freight. Hence it is that the important freight business which it does, and the large proportion of that business which is interchanged with steam roads, proves merely the successful character of the enterprise. It has no significance as indicating that the Piedmont and Northern is not an interurban.

The court below, however, clearly considered this general freight business, interchanged with other roads, as taking the Piedmont and Northern out of the interurban class. In its opinion, having described the local passenger and freight business, undoubtedly interurban in character, the court said:

> "The local passenger and local freight business thus described give to the road the peculiar features upon which the petitioner relies to distinguish it from the ordinary steam railroad. *But this business constitutes only a small part of the petitioner's operations. Far greater is its general freight business, made possible by interchange relations with steam trunk lines* in

the south through which it is connected for the receipt and delivery of property with vast sections of the United States. *Upon this phase of its activities, the Commission, in its opinion, and the opponents of the petitioner in this case depend to show that the road is not merely an interurban electric railway, but something far more important in the business of transportation.* In the nature of things, its extra-interurban operations consist of freight movements. This is so because the great bulk of its passenger traffic is local and is carried in cars which cannot be used on steam roads; while its freight cars can be and are freely interchanged with connecting steam railroads." (R. 235.)

* * *

"*It is obviously difficult* to form an exact definition of the term under discussion and *to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad,* engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. *But there is no difficulty in the case at bar* in determining that the Piedmont and Northern has *ceased to be primarily an interurban railroad.* If any line of demarcation is to be drawn there can be no doubt that *a railroad, 92 per cent of whose traffic comes from the general transportation of freight,*

> *and 95 per cent of whose freight traffic is interchanged with carriers* connecting it with all parts of the United States, *is to be placed in the same category as a general steam railroad.*" (R. 246.) (Italics ours.)

There is no escape from recognition of what has been done in this case. The Commission has held the Piedmont & Northern not an "electric interurban railway" solely because it is doing a successful and large freight business interchanged with connecting lines. While Congress excepted *all* interurban electric railways, the Commission has determined to except something less than all. It has determined that it will stretch the language of the statute to cover some roads which Congress did not cover, but which, in the opinion of the Commission, ought to be covered.

It may be that extensions of electric railroads ought to be subject to regulation. It was, as we have seen, represented to the Congress by the Electrics that "not to exceed 5 per cent of the gross earnings of all electric railways * * * is derived from interstate traffic." Congress evidently felt that the interurbans did not sufficiently affect the interstate transportation situation to call for a regulation of their new construction and of their securities issues. It may possibly have been in error; but it is not for a commission or a court, under the guise of construction, to do what Congress left undone, even though it may think Congress made a mistake.

THE COMMISSION AND THE COURT BELOW CALLED THE PIEDMONT AND NORTHERN AN INTERURBAN, BUT REFUSED IT THE BENEFIT OF THAT CLASSIFICATION

So clearly does the Piedmont & Northern fall within the interurban class that both the Commission and the court below called it an interurban, and found that it performs the services of an interurban, while refusing it the benefit of that classification.

In its report (R. 37) the Commission, speaking of the passenger service of the Piedmont & Northern, says: "The line * * * performs an ordinary interurban passenger service."

The Commission's argument in its brief below, in this case, may fairly be said to be that the Piedmont & Northern is an interurban which ought to be regulated. That it falls within the description of an interurban in all respects—aside from its capacity to do an important freight business, and the fact that it does such business—is not denied. It is urged merely that its business has become so important that the federal exceeds the local interest. It is said:

> "*While an electric interurban* which has, in connection with its local business, built up a considerable interstate freight business, should * * * be included (under) 15a, *still if its principal and primary business continued to be the purely local carriage of passengers and small freight*, the

> extension of its lines * * * should be left to local authority, but when, *as here*, * * * the exclusively local passenger and freight business *is a small proportion of the whole * * * the local interest* in the new extension certainly *does not measure up to the federal interest.*" (Italics ours.)

Here is no denial of the interurban character of the passenger business and of the strictly local freight business. It is stressed only that such business is of small importance *in comparison with the larger interstate business.*

This begs the question under consideration. The assumption is gratuitously indulged that interstate business, and business not "strictly local" is incompatible with interurban character on the part of the carrier, whereas, as we have seen, Congress used the term "interurban electric railway" to cover electrics the principal source of revenue of which was freight traffic.

In the opinion below, while the Court sustained what the Commission did, *it nevertheless called the Piedmont & Northern an interurban.* It said:

> "The use of city streets for the collection and delivery of freight is a peculiar characteristic of the *Piedmont & Northern and other interurban roads.* (R. 233.)
>
> "It is true that *an interurban carrier* may be entitled to that descriptive name

although it participate in general freight traffic. * * * Freight traffic may be *limited in extent* and within the scope of a carrier devoted primarily to local business, and at the same time be general in its nature. * * * It is obviously difficult to frame an exact definition, and to say when the general freight business of an electric railway has *become so great that it has crossed the line between an interurban railroad* engaging in the general transportation of freight and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont & Northern has ceased to be *primarily* an interurban railroad. * * * It is going too far to say that the Piedmont & Northern is outside the jurisdiction of the Commission over extensions because *literally speaking it is an interurban.* (Italics ours.) (R. 246-247.)

Respectfully submitted,

JOHN E. BENTON,
General Solicitor.
CLYDE S. BAILEY,
Assistant General Solicitor.
National Association of Railroad and Utilities Commissioners.

FILE COPY

FILED
DEC 28 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 164.

PIEDMONT & NORTHERN RAILWAY COMPANY AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, *Appellants,*

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, ET AL., *Appellees.*

BRIEF ON BEHALF OF INTERVENING STEAM RAILROADS, APPELLEES.

L. E. JEFFRIES,
S. R. PRINCE,
S. S. ALDERMAN,
Solicitors for Southern Railway Company.

JAS. F. WRIGHT,
Solicitor for Seaboard Air Line Railway Company.

CARL H. DAVIS,
F. B. GRIER,
Solicitors for Charleston & Western Carolina Railway Company.

CARL H. DAVIS,
Solicitor for Atlantic Coast Line Railroad Company.

EDWARD S. JOUETT,
WM. C. BURGER,
Solicitors for Louisville & Nashville Railroad Company.

JAMES J. MCLAUGHLIN,
Solicitor for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	11
1. Status of Piedmont & Northern as now constituted	11
2. Its character if extended as proposed	22
3. Interrelation of Piedmont & Northern with Duke interests and other shippers.	33
4. Legislative purpose and present national railroad policy as determining proper construction of statute	37
5. Effect of proposed extensions on national transportation system	44
6. Predominant part of appellant's business must control its classification	50
7. Literal meaning of word "interurban" and emphasis on word "electric" cannot govern construction of statute	53
8. Comparison of sec. 1, par. (22) with other statutory provisions does not assist appellant	55
9. Application of canons of statutory construction to statute involved in this case	58
10. History of "interurban" exception in sec. 1, par. (22), as guide to proper interpretation thereof	60
11. Case of United States v. Village of Hubbard, 266 U. S. 474, does not support appellant's contentions	70
12. Appellant's assumption—"Once an interurban, always an interurban"—is wrong	72

Page

13. Reply to argument based on language used in Railway Labor Act 74
14. Additional reasons why decree below should be affirmed 77

CONCLUSION 81

APPENDIX.

A. Graph prepared from record, showing interrelations of Duke interests.
B. Chart of affiliations of Piedmont & Northern directors with shipping interests.

TABLE OF AUTHORITIES.

Statutes:

Railway Labor Act, 1926, 44 Stat. 577, U. S. C., Title 45, sec. 151 ..... 9, 74
South Carolina Acts, 1911, c. 214, p. 373..... 12
South Carolina Code, 1922, sec. 5041 (4) 18
Transportation Act, 1920, 41 Stat. 456, U. S. C., Title 49, sec. 1, par. (18) and (22)..... 3
ibid., sec. 300 ..... 9, 74
Urgent Deficiencies Act, 1913, 38 Stat. 219, U. S. C., Title 28, sec. 41, subd. (28), and sections 43 to 48 ..... 2, 80

Cases:

Alexander v. The Mayor and Commonalty of Alexandria, 5 Cranch 1 76
Amsterdam, J. & G. R. Co., In re, 33 N. Y. S. 1009. 61
Auburn & W. Ry. Co., In re, 55 N. Y. S. 895..... 62
Brotherhood of Locomotive Engineers v. Spokane & Eastern Ry., U. S. Labor Board dec. No. 33 75
California Railroad Commission v. Southern Pacific Co., 264 U. S. 331 ..... 37, 42

Page

Chicago Junction Case, 264 U. S. 258..... 42
Construction and Operation by L. & N. R. R., 124 I. C. C. 581 48
Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456 .....37, 79
Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co., 286 Fed. 540 65
Eastern Ry. Co. of Minnesota, In re, 116 N. W. 841 62
Kings, Q. & S. R. Co., In re, 39 N. Y. S. 1004.... 62
Kirkpatrick v. Piedmont Traction Co., 170 N. C. 477 19
Lackawanna & Wyoming Valley Ry., 105 I. C. C. 178 57
Long Lake R. Co., In re, 42 N. Y. S. 125..... 62
Milwaukee Ry. Electric & Light Co., 206 N. W. 201 62
New England Divisions Case, 261 U. S. 184..37, 42, 79
New Hamburg & P. C. R. Co., In re, 27 N. Y. S. 664 61
People v. Public Service Comm., 125 N. E. 438.. 62
People ex rel. N. Y. Central & H. R. Co., v. Public Service Comm., 88 N. E. 261..... 62
People ex rel. Steward v. Board of Railroad Commissioners, 58 N. Y. S. 94 62
Piedmont & Northern Railway Co. v. United States, 30 Fed. (2d) 421 5
Proctor & Gamble v. United States, 225 U. S. 282 80
Proposed Construction of Lines by Piedmont & Northern Ry. Co., 138 I. C. C. 363..... 4
Proposed Control of Sacramento Northern Ry. by W. P. R. Co., 71 I. C. C. 653..... 68
Rochester, C. & E. Traction Co., In re 102 N. Y. S. 1112 62
Roy v. Illinois Commerce Comm., 153 N. E. 648.. 62
Spokane & Inland Empire R. Co. v. United States, 241 U. S. 344.....59, 60
Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266 .....8, 37, 39, 41

Page

United States v. Village of Hubbard, 266 U. S. 474 ..... 9, 70
Wisconsin Railroad Commission v. C., B. & Q. R. Co., 257 U. S. 563 ..... 37, 42, 79

REFERENCES TO CONGRESSIONAL RECORD:

Vol. 58, p. 8313 64
Vol. 59, p. 863 64

REFERENCES TO HOUSE COMMITTEE HEARINGS ON H. R. 4378, 65TH CONGRESS:

Vol. 1, p. 14 63
Vol. 1, pp. 98, 123 64
Vol. 9, p. 1613 66
Vol. 18, p. 3418 67
Vol. 19, p. 3554 68

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 164.

PIEDMONT & NORTHERN RAILWAY COMPANY AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, *Appellants*,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, ET AL., *Appellees*.

BRIEF ON BEHALF OF INTERVENING STEAM RAILROADS, APPELLEES.

Statement of the Case.

This is an appeal from a final decree of the District Court for the Western District of South Carolina, a statutory court of three judges sitting, which decree dismissed the petition of the petitioner, Piedmont & Northern Railway Company, the appellant here.

The petition was brought in equity against the United States, under the provisions of the Act of October 22, 1913, c. 32, 38 Stat. 219, U. S. C. Title 28, sec. 41, subd. (28), and sections 43 to 48, to enjoin, set aside, and annul an order of the Interstate Commerce Commission rendered in the proceeding before the Commission in which the appellant Piedmont & Northern Railway Company was an applicant for a certificate of public convenience and necessity for the extending of its present lines of railroad from Spartanburg, S. C., across the state line to Gastonia, N. C., there to connect with its second present line of railroad running from Gastonia to Charlotte, N. C., and for the extending of its line from Charlotte on to Winston-Salem, N. C. In that proceeding the Commission found that the present and future public convenience and necessity was not shown to require such construction (R. 76) and denied the application for a certificate (R. 80).

In the proceeding before the Commission, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railway Company, Carolina, Clinchfield & Ohio Railway Company of South Carolina, Clinchfield Northern Railway of Kentucky, and Louisville & Nashville Railroad Company, hereinafter referred to as the intervening steam railroads, intervened in opposition to the application for certificate. The states of North and South Carolina and the utilities commissions thereof, various cities and towns along the proposed extensions, certain trade organizations, and the National Association of Railroad & Utilities Commissioners intervened in behalf of the application. The Georgia & Florida Railroad, which had already been granted authority to extend its line from Augusta, Ga., to Greenwood, S. C., where it would connect with

the southern terminus of the existing line of the Piedmont & Northern, also intervened in behalf of the application.

The applicant raised before the Commission the question of the Commission's jurisdiction by moving to dismiss its own application, for the alleged want of jurisdiction in the Commission to pass upon it, on two grounds:

> 1. That the extension projects covered by the application were not in fact projects for new extensions of lines, but were merely for the carrying out of construction already undertaken in good faith prior to the effective date of the Transportation Act of 1920 and thereafter prosecuted with reasonable diligence and without abandonment.
>
> 2. That the applicant was an interurban electric railway, not operated as a part or parts of a general steam railroad system of transportation, within the meaning of the exception contained in Paragraph (22) of Section 1, exempting such interurbans from the provisions of Paragraph (18) thereof requiring certificates of public convenience and necessity.

On the merits the applicant asserted that, if the Commission should find that it had jurisdiction, the application should be granted on the asserted ground that the public convenience and necessity demanded the construction of the proposed extensions.

Evidence comprising a voluminous record was taken before the Examiner of the Commission. The Examiner filed a proposed report recommending a finding that the Commission had jurisdiction and a finding that the public convenience and necessity did not require

the construction of the proposed extensions and that the application be denied.

On exceptions to the proposed report of the Examiner the case was presented on briefs and oral argument to the full Commission (R. 31), on December 10, 1927. On April 3, 1928 (R 29) the Commission handed down its final report and order (R. 29-80) finding against the applicant on each of its grounds of objection to the jurisdiction, and holding on the merits that public convenience and necessity had not been shown to require the construction of the proposed extensions, that they would constitute unnecessary duplication of transportation lines paralleling and competing with existing adequate carriers, to the impairment of their capacity to serve, and ultimately against the interests of the public itself, in violation of the theory of the Transportation Act (138 I. C. C. 363).

The report of the Commission (R. 29-80) contains an exhaustive review of the evidence and of the contentions both on the merits and on the question of jurisdiction.

In the petition in the District Court below, no attack was made upon the action of the Commission as to its finding on the question of public convenience and necessity, the petitioner admitting that the decision of the Commission on that question was final, but the petition and the prayer for injunction therein were grounded upon the asserted want of jurisdiction of the Commission to entertain the application for certificate on the two grounds above stated.

In the District Court the National Association of Railroad and Utilities Commissioners was allowed to intervene in behalf of the petition and the Interstate Commerce Commission and the same steam railroads

above named and referred to as intervening steam railroads were allowed to intervene as defendants opposing the petition.

The cause was heard in the District Court upon the record before the Commission and at the suggestion of the District Court and for its convenience the voluminous record before the Commission was reduced by counsel to narrative form (R. 224).

The District Court, in an extremely well considered and careful opinion written by Soper, District Judge, (reported in 30 Fed. Rep. (2d series) 421) reviewing the pertinent evidence on the record in detail, held that the extension projects covered by the application were not projects which had been undertaken in good faith prior to the effective date of the Transportation Act, and held that the Piedmont & Northern as at present existing and as its lines were proposed to be extended was not and would not be an interurban electric railway within the meaning of the exception contained in Paragraph (22) and held, accordingly, that the Commission had jurisdiction of the application and dismissed the petition to enjoin, set aside and annul the order of the Commission.

Although its assignments of error covered the District Court's decision as to the Commission's jurisdiction on both grounds of the attack, on its brief in this court (2) the appellant expressly abandons the assignments of error seeking to raise for review the District Court's holding that the extension projects had not been undertaken in good faith prior to the effective date of the provisions of the Transportation Act.

The sole question for review here is whether upon the facts and evidence on the record the appellant, Pied-

mont & Northern, is, and as proposed to be extended, would be an "interurban electric railway" within the meaning of the exception contained in Paragraph (22).

The decision of this question involves: first, the determination as to the essential character of the Piedmont & Northern as at present operated, and as proposed to be operated over the proposed extended lines, and of the essential character of its business over the present and proposed lines; second, the proper construction of the exclusion language contained in Paragraph (22) excepting "interurban electric railways" from the provisions of Paragraph (18) giving the Commission supervision over extensions and requiring certificates of public convenience and necessity.

The record in this court has been substantially abbreviated by elimination, pursuant to stipulation, of all of the evidence on the record before the Commission relating to the question of public convenience and necessity and of all the evidence except that conceded to be material to the issue as to the jurisdiction of the Commission (R. 209-210).

The facts as to the character of the existing lines of the Piedmont & Northern and of the business now carried on by it, and as to what would be the character of the line if extended as proposed and of the business to be carried on over such extended line are substantially without dispute and the appellant admits that the material facts are fairly and accurately stated in the opinion of the District Court (appellant's brief p. 7).

On behalf of the intervening steam railroads, appellees, we shall make fuller reference to these admitted facts in connection with the various points of the argument, which are summarized as follows:

SUMMARY OF ARGUMENT.

I.

The Piedmont & Northern with its present disconnected lines is of such character and does a railroad business of such character that it is distinctly of national scope and significance, and is without the regulatory competency of individual states.

II.

Considering its lines as proposed to be extended, connecting with the Georgia and Florida on the South and the Norfolk and Western on the North to form a new effective trunk line of railroads through the Southeast, and considering the business it would then do, its essential character as a freight carrying railroad of national rather than local importance would be greatly enlarged.

III.

The ownership and domination of the Piedmont & Northern by the Duke interests and its interrelation with powerful allied freight shippers similarly controlled by the same owners produce an aggravated form of competition with steam carriers proposed to be paralleled and duplicated, distinctly a matter of national concern, and a powerful circumstance to show that it is not an "interurban electric railway" within the meaning of Paragraph (22).

IV.

The true test is to be found in a consideration of the legislative purpose and of the new railroad

policy introduced by the Transportation Act and in the principle of construction laid down by this court in *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266.

V.

Extensions of a railroad which would have such a destructive effect as these proposed extensions on existing steam railroads cannot be deemed extensions of lines of an "interurban electric railway" exempted from federal supervision by Paragraph (22).

VI.

Appellant's attempt to treat a wholly inconsiderable part of its business as being its "distinguishing characteristic" and to eliminate the predominant part of its business as controlling its distinctive character and classification is unsound.

VII.

The attempt to limit the word "interurban" to its etymological sense or to eliminate it altogether from consideration in construing the statute, and to make the word "electric" the key to the construction leads *ad absurdum*.

VIII.

The argument of the appellant based upon comparison of the varying language of the different sections of the Transportation Act and other statutes falls far short of the result that an electric railway of the essential character of the Piedmont & Northern is excluded from federal regulation as to extensions as being an "interurban electric railway."

IX.

A proper application of the ordinary canons of statutory construction inevitably leads to the conclusion that the Piedmont & Northern is not an "interurban electric railway" within the meaning of the exclusion language of Paragraph (22).

X.

A consideration of the history behind the Transportation Act and the exception contained in Paragraph (22) and of the prior legislative proceedings inevitably leads to the conclusion that this extension project of the Piedmont & Northern is not within the exclusion language of Paragraph (22).

XI.

The case of *United States v. Village of Hubbard*, 266 U. S. 474, relied on by the appellant, is not authority for the interpretation contended for.

XII.

The appellant's assumption—"once an interurban, always an interurban"—is wrong. The court below correctly held that whatever may have been its character originally, the Piedmont & Northern has long since invaded the national field of transportation to the extent that it has clearly stepped out of the "interurban" class.

XIII.

The decision of the U. S. Labor Board construing section 300, and the use of somewhat similar language in the Railway Labor Act of May 20,

1926, cannot be construed as an adoption by Congress of the Labor Board's interpretation and as a retroactive declaration that language used in the Transportation Act had the meaning attributed to similar language by the Labor Board.

XIV.

Regardless of the view which this Court may entertain as to the construction of the words "interurban electric railway", the decree below should be affirmed as ultimately correct, for that, in any event, the suit should have been dismissed on either or both of the following grounds: (1) That the Piedmont & Northern, even if an interurban, is and would be operated "as a part or parts of a general steam railroad system of transportation"; and (2) the Commission's order is a negative order, not subject to injunction by the courts under the Urgent Deficiencies Act.

ARGUMENT.

Point One.

The Piedmont & Northern With its Present Disconnected Lines is of Such Character And Does a Railroad Business of Such Character That it is Distinctly of National Scope And Significance, And is Without The Regulatory Competency of Individual States.

Of course, in passing upon the question whether the proposed extensions would be the extension of lines of an "interurban electric railway" within the meaning of the exception in Paragraph (22) the decision must be based upon the true character of the Piedmont & Northern Railroad and of the business to be done by it if its lines should be extended as it proposes, and is not to be limited by a finding as to the present character of the existing lines and business.

However, both the Commission and the District Court have found that with its present disconnected lines of railroad and with the present business which it carries on over those lines the Piedmont & Northern is already an interstate freight carrier having such extensive freight business, the predominant part of it being interchanged with steam railroads and moving throughout the United States, that in its present status it has become a railroad of national scope and significance and has long since departed from, if it ever was in, the class comprehended within the meaning of the term "interurban electric railway."

The Charter.

The Piedmont & Northern Railway Company was incorporated by a special act of the General Assembly

of South Carolina, approved February 24, 1911 (see R. 210-217), which act authorized it to "construct, maintain and operate a line or lines of railway, with one or more tracks, to be operated by electricity or other motive power," in and through certain counties in South Carolina and such other counties in the state as might be selected by the corporation with the right to "purchase, lease, or otherwise acquire the railway and other property, including the rights and franchises, of any other railroad company or state railway not now in existence or hereafter created in this state, or in any other state of the United States," and to "hold, possess, operate, enjoy, exercise, and dispose of the same." In addition to these and other powers specially enumerated, the corporation is granted by the Act (R. 210) all "the rights and powers conferred upon railway corporations by Chapter XLVIII of the Code of Laws of South Carolina, and by all amendatory and supplemental Acts." The Act further grants the power of eminent domain and the power to condemn the right of way for its lines of railway not exceeding fifty feet on either side of the center as in the case of other railroads (R. 213-214).

From this it will be seen that the Piedmont & Northern was not incorporated as an interurban railroad but was incorporated as an ordinary railroad with all the rights and powers conferred upon railroads by the laws of South Carolina and in particular with the power "to be operated by electricity or *other motive power.*" It is clear that under its charter powers the Piedmont & Northern could abandon electric operation and adopt steam operation for any part or the whole of its line at any time.

Physical Features and Character of Business.

We quote from the lower court's opinion the following succinct statement of the undisputed facts as to the nature and character of the Piedmont & Northern's present lines of railroad and of the business carried over these lines (R. 235-37):

> "The road bed, rolling stock and equipment are of such a character that it is well suited to co-operate with steam railroads in the transmission of freight to distant points. Freight trains of 45 cars, using 2 locomotives, are not unusual; the average train is 20 cars. Most of the freight traffic is handled in cars owned by steam railroads but the petitioner owns 165 automobile cars and 99 other box cars, all of which are of ordinary steam railway type and move freely on foreign roads. Altogether, there are 337 cars. The construction is that of a standard steam railway. Expensive grading was undertaken; and grades and curves are suitable for heavy traffic. Rails are of 80 lb. section. Bridges were made as strong as those on the Southern Railway, and the locomotives purchased were heavier than was necessary for merely local traffic. The purpose of the builders from the beginning was to construct a line of railroad which would aid in the industrial development of the (fol. 285) Piedmont region and serve as a means by which mills and factories could find connections with the steam railroads of the country for the delivery of freight. Points of contact with carriers extending to outside territory have been obtained in as large a number as possible.**

"**The Piedmont and Northern has the following points of interchange on through routes in addition to switching points with steam railroads:

Traffic agreements have been made with the Seaboard Air Line, the Southern Railway and other roads with reference to rates and the division of revenue received in the interchange of traffic. While street railways have been used for local deliveries, the through freight does not pass through the cities, but is carried over additional lines which run around the cities and avoid the city streets.

"The business methods of the road are similar in many respects to those of steam railroads. It is a party to the tariffs of the steam roads and to the uniform express contract of the American Railway Express Company. It is a member of the American Railway Association, the Southern Freight Association and other traffic organizations of the steam roads. It is represented by powers of attorney in nearly every tariff bureau of the United States and has 502 published tariffs. It follows the methods of steam roads in matters of rate divisions, interline billing, claim settlements and in all of its relations with shippers and consignees. It publishes a tariff directory which is on file with the Interstate Commerce Commission. It has a general agent in New York, a commercial agent at Atlanta and at all of its connecting points.

"(fol. 286) The entire territory east of the Mississippi is tributary to the road in that freight originating on and destined to it is derived from or moves to every part of that section of the United States. While the matter had not been

---

Continuation of footnote on page 13.

Points of Interchange.	Connections.
Charlotte, N. C.	Southern Railway.
Pinoca, N. C.	Seaboard Air Line Railway.
Gastonia, N. C.	Southern; C. & W. C. Ry.
Greenwood, S. C.	Seaboard Air Line Ry.
Shoals Junction, S. C.	Ware Shoals R. R.
Anderson, S. C.	Blue Ridge R. R. and C. & W. C. Ry.
Greenville, S. C.	Southern; C. & W. C. Ry.; G. & N. Ry.
Spartanburg, S. C.	Southern; C. & W. C. Ry.; Clinchfield."

studied in detail, the evidence tended to show that the road also sends freight beyond the Mississippi to the Pacific coast and to New England.

"The distribution of operating revenues very clearly tells the story. Petitioner's witnesses, speaking in round figures, state that 92 per cent of the revenue is derived from freight and only 8 per cent from passenger traffic. The detailed figures for 1926 show even a greater disparity.** The contrast between the revenues from local business and that from business interchanged with steam roads in 1926 is equally striking. While 97.63 per cent of the passenger revenue was derived from local traffic, and only 2.37 per cent from interchange, the reverse is true with revenues from freight of which only 4.75 per cent came from local station to station movement and 95.25 per cent from traffic handled jointly with steam roads. Of 72,886 loaded cars handled, 68,370 were interchanged, most of them in interstate movement, reaching all parts of the United States."

"**Operating Revenues of the P. & N. for the year 1926.

FREIGHT.

	per cent	
Local station to station	4.75	$108,572.05
Freight interchanged with connecting lines	93.12	2,130,843.80
Overhead or bridge traffic	2.13	48,676.13
		$2,288,091.98

PASSENGER.

Local station to station	97.63	$135,258.97
Passengers exchanged with connecting lines	2.37	3,280.71
Total Passenger		$138,539.68
Total freight	90.90	2,288,091.98
Total passenger	5.50	138,539.68
Express revenue	3.60	39,440.00
Mail		897.00
Other sources		50,393.00
Total revenues		$2,517,361.66"

The character of the petitioner's railroad, rolling stock and equipment and the character of its present business, substantially as set out above, were also found by the Commission (R. 36-8).

From the standpoint of the method of its operation, and the service it renders to its patrons the Piedmont & Northern is abundantly shown by the record not to differ from the ordinary steam railroads, except in the one particular that it uses electric locomotives instead of steam.

Description of Road by Its Own Officers.

Both the Commission in its report (R. 38) and the Court in its opinion (R. 240) referred to the fact that Mr. Cureton, Traffic Manager of the Piedmont & Northern, in his testimony described the railroad as being "interurban plus." And he said, "it performs all the characteristic services of an interurban railroad and equals that of the standard railroads in other respects" (R. 152).

This witness further testified:

> "I have made no study between the Piedmont & Northern and other electric interurban railways. I do not know whether the distinguishing characteristic of an electric interurban railroad is the dominance of local and interurban passenger traffic. I do know that the passenger, baggage and express traffic do not predominate on the P. & N. Essentially and in the large, the P. & N. is a freight carrier, and it is from freight that it gets its revenue and that is the source it expects to get its revenue from when extended. The great majority of freight on the P. & N. is interstate" (R.152-153).

Mr. Lee, the President of the Piedmont & Northern and the engineer who laid out and built the road, although testifying that he intended to design and construct an interurban electric railway, stated that the specifications for the road went ahead of the current practice for interurbans at the time (R. 120 middle).

The most cogent and convincing evidence on the record as to the nature and character of the Piedmont & Northern's present lines of railroad and the business carried on over those lines, showing clearly that the only difference between its lines of railroad and business and the lines and business of ordinary steam carriers is the one difference of electric motive power, was the statement made before the Interstate Commerce Commission on November 29, 1920, by Mr. Taylor, then President of the Piedmont & Northern, in Case 11774, *South Carolina Fares and Charges*, a certified copy of which was introduced in evidence in this proceeding before the Commission as exhibit No. 115 (R. 143-147), from which we quote as follows:

> "Mr. Chairman, and gentlemen. I shall not attempt to make any argument upon the general principles underlying this case, for the reason that it has been so elaborately argued by Mr. Rixey, but I shall address myself solely—except perhaps incidentally—to the idea that any order that is issued here should comprehend and include the Piedmont and Northern Railway Company. I would not have thought that necessary but for an expression that appeared in your last order, in the Illinois case. I am not attempting to get you to unsay anything that you said in that case, but I want to point out, if I may, facts and circumstances which make the expression in that case inapplicable here.

"In the first place, the Piedmont and Northern Railway Company is an electrically operated railroad in that it employs electric locomotives instead of steam locomotives, and that is the only distinction between it and the steam roads.

* * * * * * * *

"In this case before us, we are parties to this petition. We are interstate carriers in the fullest sense of the word, we were taken over by the Government and operated as a part of the Government's properties. Sixty-five per cent of our business is interstate business. We load cars from our stations on through bills of lading, through cars to the Pacific Coast, and we are in direct competition with the trunk lines in the South, not only for interstate business, but for intrastate passenger business.

"If the Commission please, in my opinion there would be every reason in the world, and certainly the same reasons for excluding in any raise the electrically operated portion of the Chicago, Milwaukee & St. Paul, as there would be for excluding us. The same reasoning would apply to the Norfolk & Western, the undisputed and indisputable fact being that we are a railroad competing for interstate business, 65 per cent of our revenue being derived therefrom. We are a class one railroad, under your definition of the classifications of railroads, and the only difference between us and any steam railroad operating in this country is the fact that we employ an electric locomotive, which the steam railroads some day must come to, instead of a steam locomotive."

Legal Status in Charter States.

It is interesting to observe that the general statute law of South Carolina (Code 1922), the parent state which chartered the Piedmont & Northern, gives a

statutory definition of an interurban railway which clearly excludes the Piedmont & Northern. That definition is as follows:

> "(5041) Sec. 4. 'Street Railway' and 'Interurban Railway' Defined.—In the construction of this Section and Section 5 the phrases 'Street Railroad' or 'Street Railway' shall be construed to include all railroads and railways operated by electricity, whose main business consists in the transportation of passengers between different points within the limits of a municipality; and the phrases 'Interurban Railroad' or 'Interurban Railway' shall be construed to include all railroads and railways operated by electricity whose main business consists in the transportation of passengers from one municipality to another."—

Under that statutory definition it is quite clear that the Piedmont & Northern, only about 5 per cent of whose business is passenger business, is not an interurban railway under the laws of South Carolina.

The applicant's line of railroad from Gastonia, N. C., to Charlotte was constructed by the Piedmont Traction Company and was operated by that Company until taken over by the Piedmont and Northern. This section of the line was then exactly what it is now. Just as the statute of South Carolina has defined this road not to be an interurban railroad, so the Supreme Court of North Carolina has held that it was a regular standard gauge railroad, in effect a "steam railroad", and was not an interurban road, in the case of *Kirkpatrick v. Piedmont Traction Company,* 170 N. C. 477.

That was a suit brought by an abutting property owner to recover damages for the laying of the Piedmont Traction Company's track and its operation in

the highway abutted by his property on the theory that it constituted an additional burden on the fee. It is the law of North Carolina that a street railway or an interurban railroad does not constitute an additional servitude but that a regular steam or commercial railroad does. The character of the business determines whether it constitutes an additional burden or not. In this case the Supreme Court of North Carolina held that the applicant's line owned by the Piedmont Traction Company and operated by it, did constitute an additional burden because it was a regular standard railroad engaged principally in the conduct of a general freight business. The court said:

> "We are of opinion that, from the nature and description of the defendant's business as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a 'steam railway' and cannot be regarded as the ordinary street railway. The matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it."

District Court's View.

Upon all the undisputed evidence in the cause the District Court came to this final conclusion as to the nature and scope of the business of the Piedmont & Northern (R. 251):

> "Its (the Piedmont & Northern's) freight traffic dominates so completely the field of its operations, and reaches so far, through interchange with other railroads, that it is outside the class which Congress intended to exclude from the control of

the Commission. Even if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so similar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent."

Again, the District Court in its opinion said (R. 247):

> "It is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont and Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn there can be no doubt that a railroad, 92 per cent of whose traffic comes from the general transportation of freight, and 95 per cent of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad."

We shall in this brief advert to a number of tests and considerations bearing upon the proper construction of the statutory expression "interurban electric railway" contained in the exclusion language of Paragraph (22) of the Act, but in last analysis the argument of this brief will be that the line between interurban railways within the meaning of that language and railroads which are not interurbans will be found to lie between that class of railways which are of dis-

tinctly local scope, significance and importance and hence are within the regulatory capacity of the individual states, and those railroads which are of larger and national scope, significance and importance and whose extensions are only within the regulatory competency of the national government.

Although on the record it is clear that the Piedmont & Northern, as a very incidental and insignificant part of its business does perform interurban functions, not however substantially different from those performed by all railroads, yet the entirely predominant part of its business has already, with its existing lines, attained such character and importance that its railroad and its business have become distinctly of national scope and concern and are clearly without the regulatory competency of individual states.

Point Two.

Considering Its Lines as Proposed to be Extended, Connecting with the Georgia and Florida on the South and with the Norfolk and Western on the North to Form a New Effective Trunk Line of Railroads Through the Southeast, and Considering the Business it would then do, Its Essential Character as a Freight Carrying Railroad of National Rather than Local Importance Would be Greatly Enlarged.

The principal purpose of the proposed extensions is to link up the present disconnected lines of the Piedmont & Northern and to tie them in with the Georgia & Florida at Greenwood, S. C., on the south, and with the Norfolk & Western on the north at Winston-Salem, N. C., to form a new trunk line of connecting carriers from Florida to the East, North and West, for the

carriage of heavy trunk line traffic, directly paralleling and duplicating the existing trunk lines of the Seaboard, the Atlantic Coast Line, and the Southern.

The Commission in its report said (R. 39):

> "All of the evidence shows that passenger traffic would be of relatively very small importance, and that the line would be designed primarily to carry freight. The applicant's line, as proposed to be extended, would connect with the Norfolk & Western and Southern at Winston-Salem and with the Georgia and Florida Railroad at Greenwood. One of the purposes for the proposed construction is to form a new through route for the movement of freight between the North, East, and West, and Florida points. The applicant estimates that the proposed construction will enable it to add to its present traffic over 82,000 carloads of freight in the first year of operation, of which over 12,000 carloads would be bridge traffic."

The effect of the proposed extensions, if they should be constructed, in extending and enlarging the business of the Piedmont & Northern as a large freight carrier of national scope and importance is clearly shown by the following from the District Court's opinion (R. 237-238):

> "The proposed extensions would not alter the character of the petitioner's business. There would be the same local service in the transportation of passengers and freight since the railway could connect with street railways of the cities en route. At the same time the interchange of freight business with steam railroads would be greatly increased. Indeed if the road should be completed so as to form a continuous interstate line in North and South Carolina, it would con-

stitute the interior connecting link in a new joint through route and in effect, a new trunk line will be formed in addition to those now provided by the systems of the Southern, the Seaboard and the Atlantic Coast Line; for the Piedmont and Northern would then connect with the Georgia and Florida at Greenwood, South Carolina, on the south, and with the Norfolk & Western at Winston-Salem, North Carolina, on the north. Numerous new connections with steam roads would then be made and many new points in distant sections of the country would become accessible; and the railway would become to an increased extent an integral part of the great interstate railway system of the country.

"The amount and character of the new business which would be done in the first year of the construction of the extensions has been estimated by officials of the petitioner as follows:

Freight	$3,597,384.00
Passenger	196,502.15
Express	70,260.76
Miscellaneous	25,869.66
	$3,890,016.57

During the succeeding five years, an increase each year of 8.4 per cent over the preceding year would be expected.

"It will be observed that the existing predominance of freight over passenger revenues would continue. It is estimated that the freight traffic would have its origin in the following manner:

Local traffic having origin and destination on the Railway's lines	21%
Traffic originating beyond and destined to the Railway	44%
Traffic originating on the Railway and destined to points beyond	20%
Overhead or bridge traffic	15%"

The total main line mileage of the present lines of the Piedmont & Northern is 131.59 miles. The proposed extension for which it sought certificate of public convenience and necessity before the Commission would add 123.2 miles, thus nearly doubling the length of the present line, and making a continuous interstate line of railroad having a total main line mileage of 254.79 miles from Greenwood, South Carolina, to Winston-Salem, North Carolina.

This fact fortifies us in the view that the proposed extended railroad is not in the class of "interurban electric railways." This conclusion is rendered certain when we consider that under the guise of making purely local extensions of a local interurban railroad, the line as proposed to be extended would, as shown by the above quotations from the Commission and from the District Court, connect physically with the Georgia and Florida at Greenwood, South Carolina, and with the Norfolk & Western at Winston-Salem forming in effect a new trunk line of connecting carriers running throughout the Southeast in direct competition with and paralleling and duplicating the facilities of the existing steam trunk lines. This would of course vastly increase the extent to which the Piedmont & Northern would be engaged in general freight business of a national scope and importance.

One of the principal prizes sought by the Piedmont & Northern is the capturing of the tremendous traffic in coal from the coal fields into industrial Piedmont North and South Carolina, a traffic now wholly carried by the intervening steam railroads. In a subsequent section of this brief we shall point out the extent to which this coal traffic and other traffic could be controlled for the Piedmont & Northern by the parent Duke interests which own that railroad.

A complete revision of our understanding as to the ordinary meaning of language is necessary if we are to contemplate such a railroad carrying such traffic as being an "interurban."

W. S. Creighton, who testified in support of the application, made the claim that the end sought was not merely the construction of a local road for local service, but was to put into service the reconstructed Piedmont & Northern as a potent factor to control and handle traffic between the north and south, as well as to and from the Piedmont section of Carolina territory and other sections of the country. He said (R. 162-163):

> "I am not testifying concerning the local phases of the Piedmont and Northern. I am interested in the completion of an independent through transportation route from the South to the East and West through Piedmont, North Carolina.
>
> "The completion of the G. & F. from Augusta to Greenwood, which has been authorized by the Interstate Commerce Commission, and the completion of the Piedmont & Northern as proposed in this case, will afford a new through line from Florida to the Eastern markets. At St. Clair, Georgia, a connection will be formed with the Savannah and Atlanta into Savannah; and at Charlotte with the Norfolk-Southern into Raleigh, Washington, and Elizabeth City, North Carolina, and Norfolk, Virginia, traversing central and eastern North Carolina.
>
> "By forming the connection at Winston-Salem, traffic can move through Roanoke, thence to Hagerstown, Maryland, and to the markets of the East; thence also to Cincinnati, and Columbus, Ohio, via Kenova, West Virginia. The completion of the Piedmont and Northern will thus afford a new independent and additional compet-

ing through route from the south to the east and west, a route owned, controlled and operated by interests other than those already serving the southern territory."

The applicant's witness, J. S. Cureton, Traffic Manager of the Piedmont & Northern, testified as follows (R. 154):

"The traffic which we would expect to handle over the lines as extended, moving up from Georgia or originating on and south of the Georgia & Florida, going to the middle west, say Buffalo-Pittsburgh territory, would be a large volume of melons, cantaloupes, produce and vegetables of all sorts, lumber and forest products, and possibly citrus fruits. Commodities which we would expect to move from the north and west over the Norfolk & Western or its connections and delivered to us at Winston-Salem, and moving to points on our line and beyond, southward, would be Virginia apples, tomatoes, canned goods, plaster, cement, and New York State and Canadian produce. Of course, coal would be the largest commodity which we would expect to handle on our line."

This traffic would all be a direct diversion from the present trunk lines of the Seaboard and the Atlantic Coast Line, as well as from the Southern.

Applicant's witness E. Thomason, Vice-President and General Manager of the Piedmont & Northern, testified as follows:

"Freight traffic of the P. & N. is now about 92 per cent, and about 80 per cent of that is interstate traffic and about 12 per cent intrastate traffic.

"In 1926 the P. & N. handled 72,000 cars interchange. We had at one time a regular Pullman

schedule with the Seaboard. My present estimate is that with the proposed line built we will handle 85,000 cars per annum in addition to the 72,000 now handled. Of the total of 157,000 cars, approximately 26,000 will be coal and coke. The balance of the 157,000 cars would be made up of grain, packing house products, fruits and vegetables, building material, cotton and waste, sandstone, merchandize, etc., largely from the east, west and the southeast.

"The Duke Power Company has a steam plant at Greenville, S. C., which is on our line, on the Southern, and on all the other lines at Greenville; the next steam plant is at Duncan which is a smaller plant; the Greenville and Greensboro plants are smaller plants. When the new lines are built I don't think the coal down there (in S. C.) will be handled differently from what it is now unless it would be 'distress coal.' The next steam plant is at Mount Holly and its coal is handled by the P. & N. and will continue to be handled by it if the new lines are built; the next plant is at Salisbury which is a much larger one and I assume the Southern hauls it now; if the new lines are built coal for it will be handled by the P. & N. because it was put there by Mr. Duke's instructions that his railroad would be built by that point, his instructions being that the steam plant was to be put there so that it would couple in with the P. & N. which would get the freight. The next steam plant is at Greensboro; it is a small plant and I think is served by the Southern.

"I heard Mr. Lee testify about the steam plants projected; one of them to be built between the Yadkin River crossing and Winston-Salem; the P. & N. would handle coal to that plant.

"If we build the lines, we will have a through southern route by the Georgia & Florida into Florida and all the other roads we connect with, and would have a through route from Florida on through the North and West" (R. 147-148).

It is unheard of that an "interurban" railway should be projected to handle this low rated, heavy commodity. Such traffic is wholly without the scope of an interurban.

George W. Burpee, an expert witness who testified for the Piedmont & Northern, partner of the firm of Coverdale & Colpitts, engineers of New York City, testified that he had been actively engaged in engineering work since 1906, having been with Westinghouse, Church & Kerr Company, engineers, up to 1921, and since then with Coverdale & Colpitts, whose business consists largely in the examination for financial interests of railroad business and dealing generally with all features of railroad business.

This witness testified as follows:

> "I believe this line as proposed to be extended would tie into the Georgia and Florida, and at its northern end into the Norfolk and Western. The three lines will thus compose a through line from the southern termini of the G. & F. to the northern termini of the N. & W. but it would be operated by the three independent corporations, but physically would constitute a through line. I do not believe it would be as strongly competitive as if owned by one corporation; the potentiality of competition would depend upon the kind of working arrangements that might be arrived at between these three roads. The business that the G. & F. and the P. & N. and N. & W. would carry or might carry is not closed to the S. A. L. or the A. C. L. or Southern, they have to compete for it. The P. & N. is of such a character that constituting a link in what has been described as a new physical through line it could carry through freight over its part of the line. The P. & N. is of standard railroad construction and excellent

construction for the tonnage that it has to carry. I do not doubt that cars which move via the P. & N. move in unbroken carloads to the Pacific Coast; I know that they move in carloads to New England; carload movements from the P. & N. to New England or in the reverse direction were left off of Exhibits 44 and 45; bridge traffic was also left off; at present bridge traffic is not a serious matter, about 2 per cent; after the proposed lines are built this bridge traffic will be substantially increased in my opinion, almost 16,600 cars per year in both directions; that bridge traffic will be taken away from other lines" (R. 157).

An interesting comparison between the present lines of the Piedmont & Northern and other railroads of the territory as to their relative earnings per mile from freight traffic is contained in Mr. Thomason's testimony (R. 143) as follows:

"The tables I have prepared show that in 1915, the first full year of operation, Piedmont & Northern earned from freight traffic $4,413.00 per mile; the Southern Railway on all lines in North and South Carolina received from the same source $5,754.00 per mile; the Seaboard Air Line $4,613.00; and the Atlantic Coast Line $4,492.00.

"For the year 1926 these figures were:

Piedmont & Northern	$17,891.00
Southern Railway	16,725.00
Seaboard Air Line Railway	12,390.00
A. C. L. Railway	13,790.00

"The percentage increase of the Piedmont and Northern was 305.41; of the Southern Railway, 190.67; of the Seaboard Air Line Railway, 168.59; of the Atlantic Coast Line Railway, 206.99."

As to what the building of the proposed extensions would do in increasing the scope of the Piedmont & Northern as a freight carrier of national importance, is shown by the testimony of this same witness, the Vice-President and General Manager of the Piedmont & Northern (R. 141), giving the estimates of the increased revenue to be derived by the Piedmont & Northern by means of the proposed extensions. He testified:

> "Our estimate indicates that the increased revenue after completion through to Winston-Salem will for the first year be $3,890,016.57, and that for the succeeding five years it will increase each year 8.4 per cent over the preceding year, resulting as follows: Second year, $4,216,777.96; Third year, $4,570,987.31; Fourth year, $4,954,950.24; Fifth year, $5,371,166.05; Sixth year, $5,822,344.01; with substantially the same basis of increase thereafter.
>
> "New industries will be constructed on the line and much new traffic will develop at all points. The Power Company has plans for a steam power plant between the Yadkin River and Winston-Salem, which will use approximately 3,000 to 3,600 tons of coal per day. A second plant is calculated to consume between 3,000 to 3,600 tons of coal per day. The average of coal cars is about 70 tons; they run up as high as 100 tons. * * * I believe the construction will benefit the Clinchfield and its shippers, and will open a new route for Clinchfield coal moving East from Spartanburg to points on the Piedmont line; will enable the Clinchfield to become a link in a very high class short line, efficient through route from the Piedmont Section to the middle West. It will substantially increase the volume of coal consumed in the Piedmont and broaden the market for coal avail-

> able to the Norfolk and Western producers in Virginia and West Virginia. It will open a new route to the North and West by the N. & W. into and through the Piedmont territory."

The Commission, in commenting on the intervention of Georgia & Florida Railroad in behalf of the application, said with reference to the through line to be composed of the Georgia & Florida, the Piedmont & Northern, and the Norfolk & Western:

> "No evidence was introduced by the G. & F. In its brief it contends that the proposed routes are necessary to provide independent and competitive through routes between the South, East, and West via the Norfolk Southern and the N. & W." (R. 60).

The above is a brief review of some of the more important evidence as to the essential character of the railroad which will be constituted if the proposed extensions are built, a railroad of distinctly national scope and importance as a freight carrier.

The record overwhelmingly and without dispute shows that the proposed extensions are not in the pursuance of any project for a local extension of an interurban electric service or railroad, but are in the pursuance of a large and ambitious plan to complete a very important new competing line of general freight carrying railroad, forming a link in a new competing joint through route and trunk line to and from and through the states of the Southeast and carrying important freight traffic destined to and from points all over the United States.

While the present lines of the Piedmont & Northern predominantly and in essence are freight carrying rail-

roads of national scope and importance, and not interurban lines, the proposed line operated as it admittedly would be operated, in intimate conjunction and connection with its connecting steam roads, would to a greatly increased extent be predominantly and in essence a freight carrier of national importance. To allow this new joint through route and trunk line of connecting carriers to be linked up and created, would fundamentally change the whole transportation system in the Southeast, with almost incalculable injury to the existing railroads, in direct conflict with the purposes and aims of Congress in passing the Transportation Act.

Point Three.

The Ownership and Domination of the Piedmont & Northern by the Duke Interests and Its Interrelation with Powerful Allied Freight Shippers Similarly Controlled by the Same Owners Produce an Aggravated Form of Competition with Steam Carriers Proposed to be Paralleled and Duplicated, Distinctly a Matter of National Concern, and a Powerful Circumstance to Show that it is not an "Interurban Electric Railway" within the Meaning of Paragraph (22).

The District Court made this observation, in its opinion, with reference to the significance of the ownership of the Piedmont & Northern by the Duke Power interests and with reference to the interrelation between the Piedmont & Northern and other interests controlled and dominated by these Duke Companies:

> "Much testimony was offered to show that the expected increase in revenue would be accom-

> plished at the expense of the Southern and other intervening railroads, particularly since it is natural to suppose that the influence of the interests associated with the great fortune left by the late J. B. Duke would be exerted in the petitioner's behalf. This consideration is not material to the decision of the question before the court except insofar as it constitutes another circumstance tending to prove that the new business of the petitioner would not be of a local character but would be derived in great measure from the carriage of long distance freight, handled in competition with steam railroads" (R. 239).

In his statement, concurring with the final report of the Commission, Commissioner Eastman had the following to say with reference to the significance of the domination of the Piedmont & Northern and of many of its shippers by the same parent Duke interests:

> "If there were need for strengthening this conclusion, such need would be supplied by the fact that this proposed new railroad is closely affiliated with powerful private industrial interests in the Carolinas. The evils of interrelation between transportation lines and industries which they serve are manifest. Such arrangements breed privilege and preference, and run counter to the spirit and I believe also, in many cases, the letter of the law. There are enough at present without adding to the sum total, and I trust that we shall soon be able to test the legality of existing interrelations of this character" (R. 77).

It would unduly expand the scope of this brief to set out in detail the evidence as to the ownership of the Piedmont & Northern by the Duke Power Company and the Duke Farms Company and as to the ramifications of these powerful Duke interests in their ownership and control of important freight shippers and

their power to control the delivering of traffic to the Duke railroad, the Piedmont & Northern.

The facts are very fully set out in the Commission's report (R. 68-72, bottom).

The facts in detail were furnished, on cross-examination, by W. S. Lee, President of the Piedmont & Northern Railway Company, and long a business associate of the late James B. Duke. The testimony of Mr. Lee, giving the details of these interrelationships is to be found principally on the following pages of the record, 118, 119, 120, 121, 125-132.

Without going into the details it is sufficient here to state that the Duke Power Company and the Duke Farms Company, two intimately related Duke interests, controlled by the James B. Duke estate and by the Duke endowment, own the Piedmont & Northern Railway Company, own large amounts of stock in many cotton mills, tobacco factories, and other mercantile and commercial companies which are important shippers of the territory, own a great many subsidiary power companies, own public utilities companies of most of the cities of the territory, own power steam plants and propose to construct other steam plants which are and will be important shippers of freight. And the record conclusively shows that these dominant Duke interests have in the past controlled, and will in the future be able to control, and would to a greatly increased extent be able to control for the proposed extended lines, traffic of all the allied interests so as to route it over the Piedmont & Northern, thereby giving it a great advantage over the steam roads in competition, and thereby largely increasing the traffic which it would otherwise carry.*

*See Appendix A for graph prepared from record, showing interrelations of Duke interests.

An additional powerful circumstance bearing on the essential character of the Piedmont & Northern is the fact that its board of directors has manifestly been strategically chosen from among the heads of powerful freight shipping industries of the Carolinas in order to influence freight shipments over the Duke railroad. Few of its directors seem to have been chosen for their railroad experience. Of the 25 directors, 21 are managing officers or executives of important textile mills and other industries of the Piedmont; one is the chairman of the Duke Endowment; one is the president of the Piedmont & Northern, vice president and chief engineer of the various Duke power companies, trustee of the Duke Endowment, and a stockholder and director in numerous cotton mills; and the twenty-fourth is the vice president and general manager of the Piedmont & Northern (R. 127 to 129).**

All of this constitutes a tremendously significant circumstance, as suggested by the District Court, to show what the essential character of the Piedmont & Northern Railroad is, and to show that it is not in essence such a thing as is known as an interurban railroad, that it is not in essence such a railroad as that the question of its extensions here proposed is within the competency of individual states, but that it is a transportation enterprise of distinctly national significance, scope and importance, necessarily within the regulatory power of the Interstate Commerce Commission within the legislative intention expressed in the Transportation Act.

**See Appendix B for chart of affiliations of Piedmont & Northern directors with shipping interests.

Point Four.

The True Test is to be Found in a Consideration of The Legislative Purpose And of The New Railroad Policy Introduced by The Transportation Act And in the Principle of Construction Laid Down by This Court in Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co., 270 U. S. 266.

Since the passage of the Transportation Act of 1920, this Court has interpreted that legislation in at least five principal cases in which it has construed its provisions in the light of the conditions which led to the adoption of the Act, and in the light of the evils sought to be corrected and the remedies sought to be accomplished, as disclosing the legislative purpose and as controlling the proper construction of its language. They are:

Wisconsin Railroad Commission v. Chicago, Burlington & Quincy, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Railway v. United States*, 263 U. S. 456; *Railroad Commission v. Southern Pacific*, 264 U. S. 331; *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe*, 270 U. S. 266.

As we read these decisions, they announce the following four essential propositions:

1. The experience of the railroads under federal control was such that when it was proposed to return the properties to their owners the owners protested that their properties could not be turned back to them by the Government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acqui-

esced in this view and the Transportation Act of 1920 was the result.

2. The Transportation Act added a new and important object to previous interstate commerce legislation which theretofore had been designed primarily to prevent unreasonable or discriminatory rates and rebates. The new Act sought affirmatively to build up a system of railroads prepared to handle promptly all the interstate traffic of the country. It aimed to give the owners of the railroads an opportunity to earn enough to maintain their properties and equipments in such a state of efficiency that they could well carry this burden. To achieve this great purpose it put the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission.

3. One of the principal and most important purposes of this new legislation was to prevent unnecessary paralleling, duplication of facilities, and competition to the injury of established and existing railroads.

4. Recognizing that such injury to the existing carriers would probably result ultimately in harm to the public, proposed extensions will not be allowed to be made except where they are necessary and demanded by the public convenience and necessity, and in this connection public convenience and necessity means an urgent public need for the additional facilities to be furnished by the proposed extensions.

We can not imagine that Congress, in seeking to achieve these great purposes, undertook to put the

railroad systems of the country under the fostering guardianship and control of the Interstate Commerce Commission, to prevent unnecessary paralleling, duplication, and competitive building only to the extent that such paralleling, duplication, and competitive building should be undertaken by steam railroads, but left electric railroads entirely free to commit all the evils sought to be remedied without federal supervision and regulation.

Every historical and logical reason for giving to the Commission the exclusive power to grant or to deny authority to railroads to build extensions demands that it should have such authority over an application such as that disclosed by the record in this case. The whole background of the Act shows that this jurisdiction of the Commission was intended by Congress to be controlled by the essential character of the business to be done over the proposed extension, and was not to be governed by such a mere incidental characteristic as the motive power to be used.

In the case of *Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company,* 270 U. S. 266, *supra,* construing the meaning of the language used in Paragraph (22) of section 1 of the Act, this Court, as one of the tests for construction, held that the language should be construed contextually.

It is very pertinent, therefore, to consider the term "interurban electric railways" in the context in which it is written in Paragraph (22):

> "The authority of the Commission conferred by Paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of

> street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The first part of this sentence is concerned with the purely local and incidental construction or abandonment of short spur, industrial, team, switching or side tracks located wholly within one state, and hence of purely local concern. If even such spur, industrial, team, switching or side track should cross a state line, it would instantly step out of the excepted class and come within the provisions of Paragraphs (18) to (21).

As a part of the same class of extensions excluded from the requirements as to certificates of public convenience and necessity, in the last part of the sentence the expression "interurban electric railways" is grouped intimately with street railways and suburban railways, all of these being, like spur, industrial, team, switching or side tracks wholly within one state, matters of local significance and not of such broad or national significance as to be practically related to the legislative purposes expressed in the Act, or as to be calculated to cause serious injury to other existing railroads.

We think it entirely clear from the context that the exclusion language was never intended to cover a proposed interstate extension of a freight carrying railroad of the magnitude of the Piedmont & Northern, and especially such an extension thereof as would complete and put into operation a new interstate and trans-state trunk line of carriers of tremendous national importance running throughout a territory like the states of the Southeast.

We think the principle of construction expressed in

this Court's opinion in the case of *Texas & Pacific Railway Co. v. Gulf, Colorado and Santa Fe Railway Co.*, 270 U. S. 266, is entirely controlling here. There the Court was construing the exclusion language with reference to whether, under the facts there involved, the railroad construction there proposed would be an extension or would be an industrial track. The track proposed to be built was an "industrial track" in the literal sense, in that it was a comparatively short track leading to and tapping certain particular industries, just as in this case the proposed extension is "interurban" in the literal or derivative sense that it would run between cities. But it further appeared in the Santa Fe case that the proposed track was an attempt to invade new traffic territory not previously served by the carrier and already adequately served by other established carriers and that it was a matter of national significance in its relation to the general transportation system.

This Court in that case gave due attention to the arguments by the railroad sought to be enjoined, arguments strikingly similar to those advanced on behalf of the appellant here, arguments based on certain informal instructions issued by the Commission differentiating spur tracks, based upon certain accounting methods, and based upon the use of the terms "spur track" and "industrial track" in other connections by the courts, by the Commission, and by the State Legislature. But it was held that the truer guide to the meaning was to be found by construing the language contextually and by relating the language to the railroad policy introduced by the Transportation Act. It was there said:

"In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts, by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act of 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission v Southern Pacific Company*, 264 U. S. 331. The Act sought, among other things, to avert such losses.

"When the clauses of paragraphs 18 to 22 are read in the light of this congressional policy the meaning and the scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without au-

thority from the Commission, 'spur, industrial, team, switching or side tracks * * * to be located wholly within one State.' Tracks of that character are commonly constructed to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest."

This equally is the truer guide to the meaning of "interurban electric railways" used in the immediate context in the same exclusion clause of Paragraph (22). The true test is not to be found in an exact measurement of the ratio of freight traffic to passenger traffic. It is not to be found in the fact that an electrically operated railroad may perform as a very small part of its business the peculiar functions of an interurban, while at the same time it goes much beyond that and performs all the functions of a steam railroad of national importance.

The true guide to the statutory meaning, as we see it, is to be found in the distinction between an elec-

trically operated railroad which is so essentially and distinctively of local significance as not to conflict with the national purposes sought to be effectuated by the Act and as to be within the regulatory competency of state authorities, on the one hand; and, on the other hand, electrically operated railroads which go further and beyond this local scope, which propose to extend into territory not theretofore served by them, particularly into territory already adequately served by other carriers, and which are interstate freight carriers of such scope as to be of national significance and concern.

Construing the language as this Court in the Santa Fe case says it should be construed, in the light of the evils to be remedied by the Act and in the light of the new legislative policy enacted therein for the remedy of those evils, we are forced to conclude that this proposed extension of the Piedmont & Northern would constitute in a highly aggravated form the very kind of evil sought to be remedied, and that the Congress could not have used the words "interurban electric railways" as intending to exclude an extension of the character here involved.

Point Five.

Extensions of a Railroad Which Would Have Such a Destructive Effect as these Proposed Extensions on Existing Steam Railroads Cannot be Deemed Extensions of Lines of an "Interurban Electric Railway" Exempted from Federal Supervision by Paragraph (22).

As argued in section four of this brief, the true test for the construction of the exclusion language of Para-

graph (22) is to be found in a consideration of the purposes sought to be accomplished and the evils sought to be remedied by Congress in enacting the Transportation Act with the new railroad policy which it expresses.

Undoubtedly "interurban electric railways" were excluded by Paragraph (22) as comprising a class of railroads of such local and "interurban" importance as not to be calculated to inflict serious injury upon the general system of freight carrying steam roads by extensions not demanded by the public convenience and necessity and not authorized by certificate of the Commission. It cannot be supposed that the Congress deliberately intended to discriminate in favor of electrically motivated railroads as against steam railroads by excluding electrically operated roads from federal regulation of extensions while including all steam roads.

We think such broad construction will be given to exclusionary language in the statute as would nullify the legislative purposes written into the Act. That the construction contended for by the appellant would so nullify the purpose of the Transportation Act is at once seen when we consider the undisputed facts on this record as to the disastrous effect which would be worked upon the steam railroad systems of the territory by allowing these unregulated extensions into new territory not now served by the Piedmont & Northern and already adequately served by steam carriers sought by Congress to be protected by the Act.

A consideration of these facts, the paralleling and the extent of the injury that would be done to the steam railroads if these extensions should be built following a holding in this cause that they are not sub-

ject to federal regulation, has a direct bearing on the question whether Congress intended to exclude a railroad of this character when it excluded "interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

A brief scutiny of the railroad map of the territory showing existing railroads and the existing and the proposed lines and extensions of the Piedmont & Northern (Exhibit 70), will instantly show the extent to which the proposed extended lines of the Piedmont & Northern would parallel the lines and duplicate the facilities of the intervening steam railroads. Upon the face of that map itself the direct injury to these steam railroads to be caused by the proposed extensions, if constructed, may be readily seen.

We quote the facts as stated by the Commission as to the unprecedented paralleling of the Southern's lines in particular by the proposed extension:

> "Existing lines of the applicant closely parallel lines of the Southern. From Greenwood to Spartanburg the average distance between the two is about 0.5 miles; from Greenville to Greenwood about 0.13 miles, with four crossings; from Belton to Anderson about 0.5 miles. In all these cases the routes are almost identical. From Charlotte to Gastonia the average distance apart is about 2.6 miles, the maximum about 4.7 miles. This segment of the applicant's line also parallels the Seaboard closely from Charlotte to Mount Holly. The proposed line from Gastonia to Spartanburg would parallel the Southern at an average distance of about 1.1 mile, the maximum distance from any station being 3.5 miles. The proposed line from Charlotte to Winston-Salem parallels generally the Southern's main line from Charlotte to Lex-

ington, about 51 miles. From Charlotte to Kannapolis, 23 miles, its general course is nearly straight and its maximum distance from the Southern's main line is about 8 miles, average distance 3.8 miles. For the next 22 miles northward its route lies generally within less than 0.5 miles of the Southern's main line, passing about 4 miles westerly from Lexington, the junction point of the Southern and the Southbound. From this point to Winston-Salem it nearly parallels the Southbound, at an average distance of 2.6 miles therefrom. Its average distance from the route formed by combining the Southern and the Southbound is about 2.4 miles. The Southern has a single track line from Charlotte to Winston-Salem, which passes through Mooresville and Mocksville. The proposed route is from 0 to 13 miles easterly from this line, the average distance being about 8 miles. Only about 6.5 miles of the proposed Charlotte-Winston Salem line is more than 5 miles from some railroad. All of the distances from other railroads, stated above, are straight line distances'' (R. 41-42).

The Commission fully reviewed the evidence as to the traffic loss which would immediately be sustained by each of the steam railroads of the territory by direct diversion to the proposed extended Piedmont & Northern. The District Court found substantially the same facts and the annual losses are, as undisputed on the record,

Seaboard Air Line Railway Company	$1,349,250.00	(R. 60-1)
Southern Railway Company	$10,000,000.00	(R. 73-4)

The diversion from and loss to the Atlantic Coast Line Railroad Company (R. 61-2), Charleston & West-

ern Carolina (R. 62-4 and 191-4), Louisville & Nashville (R. 62-4), and Carolina, Clinchfield & Ohio (R. 62-4) will be a very large sum.

Another significant record fact which shows that Congress did not intend to exclude an extension of the kind here in question is: The Louisville & Nashville and Atlantic Coast Line have jointly leased the Clinchfield assuming thereby financial obligations of approximately $53,293,000. In a properly instituted proceeding admittedly within the jurisdiction of the Interstate Commerce Commission, Finance Docket No. 5322, *Construction and Operation by L. & N. R. R.*, 124 I. C. C. 581, the Commission exercised its jurisdiction and granted to the Louisville & Nashville a certificate of public convenience and necessity for the building of a new line from Chevrolet, Kentucky, to Hagans, Virginia, connecting its southeast Kentucky or Harlan County line with the southwest Virginia line, connecting at Norton, Virginia, with the Interstate Railroad and with the Clinchfield. The commission there found within its admitted jurisdiction that the public convenience and necessity demanded that this extension by the Louisville & Nashville be authorized to provide a new route from the coal fields.

The record here shows that the building of the proposed extensions by the Piedmont & Northern would result in immediate diversion to the Piedmont & Northern of considerable of the traffic to be handled by the Louisville & Nashville extension.

As to this the Commission said (R. 75):

> "They (the proposed extensions) would also tend to diminish the usefulness of the connection which is to be built between the L. & N. and the Clinchfield, and to postpone carrying out the ul-

timate plan for that connection, which would effect a further reduction of 52 miles in the L. & N.-Clinchfield route. This enterprise has more value to the system of through transportation than anything which would be accomplished by the proposed extensions."

From the language of the Transportation Act and the interpretation thereof by this Court, it is clear that the intent of Congress was to protect and preserve the existing system of transportation. The language it used and the interpretations thereof by this Court can only mean that Congress intended to put under the jurisdiction of the Commission all carriers whose business was such as unregulated would destroy the value of the certificate of public convenience and necessity already issued by the Commission.

The sustaining of the appellant's contention would mean that the Commission is powerless to defend and protect and preserve these extended lines of the Louisville & Nashville against depletion and impairment by the paralleling and duplication of its facilities by the Piedmont & Northern, simply because the Piedmont & Northern is electrically operated. Such a result is inconceivable.

All of the above leads to the conclusion that in writing the exception in Paragraph (22) Congress only intended to exclude electric interurbans as such and as generally understood by that term, and did not intend to exclude interstate extensions of important and powerful general interstate carriers of freight, in all respects conducting the same essential business as the steam railroads, the only distinctive difference being that they happen to be operated by electric motive power.

Point Six.

Appellant's Attempt to Treat a Wholly Inconsiderable Part of its Business as Being its "Distinguishing Characteristic" And to Eliminate the Predominant part of its Business as Controlling its Distinctive Character and Classification is Unsound.

We have here, then, a railroad which is admitted by its officers to be an "interurban plus", more than an interurban; a railroad which predominantly and in essence is of a character and has a business entirely outside of the meaning of the term "interurban."

We have a railroad which, if extended as proposed, would be to a greatly increased extent (to the extent of at least 95 per cent. of its entire business) a thing never signified by the use of the word "interurban."

And yet, because a wholly inconsiderable part of its total business would continue to be such a local city-to-city traffic in freight, passengers, baggage, mail and express as may be within the meaning of the term "interurban," the appellant contends that this inconsiderably small part of its business constitutes the "distinguishing characteristic" which determines its classification as a railroad. "Classification, where required," says the appellant on page 24 of its brief, "must be predicated upon distinctive rather than common characteristics."

We ground our argument upon the proposition that classification is to be predicated, not upon minute differences, not upon the characteristics of an inconsiderably small part of a railroad's total business, but upon the essential character of the railroad as shown by its predominant business and its relation to the rest of the railroad system of the country.

The Congress, in writing Paragraph (22), did not undertake to exclude from the provisions of Paragraphs (18) to (21) an electric railroad which is an "interurban plus" (see R. 152); did not undertake to exclude a railroad which is *more than an interurban.* It did not undertake to exclude an electrically operated railroad which "performs all the characteristic services of an interurban railroad and equals that of the standard railroads in other respects." (See R. 152.)

It did not undertake to exclude extensions of the line of essentially freight bearing railroads of national scope and importance, which extensions would have the effect to create, by tying in with two connecting steam roads, a new trunk line of carriers, handling freight moving in large volume by carload and trainload to and from points all over the United States, duplicating the adequate facilities of, and diverting important traffic and revenues from, the established lines of the steam railway system.

The appellant has undertaken throughout this controversy to lay great stress on what it terms the "peculiar characteristics" of its local interurban service which it asserts distinguish that service from the similar local, interurban service performed by the steam railroads of the territory.

Its witnesses undertook to point out that it is able to handle its electric locomotives over sharper curves than are practicable for steam locomotives (R. 121-140), but the steam roads showed without contradiction that in numerous instances they constantly operate steam locomotives over curves as sharp or sharper than any of those on the lines of the Piedmont & Northern (R. 166, 167-168, 196).

The Piedmont & Northern's witnesses undertook to

point out an alleged peculiar characteristic in the pick up of cars at and the delivery of cars to the individual industries (R. 14). But it was shown without contradiction that the steam roads pick up and deliver from and to the industries in exactly the same manner. (R. 165, 168, 170-171, 173.)

The Piedmont & Northern undertook to show that it had more frequent between-city stops for local (interurban) station-to-station freight (R. 138, bottom) but the undisputed evidence showed that the local freight stops of the Piedmont & Northern averaged exactly the same number a mile as the freight stops of the Southern Railway Company in the same territory, exactly one on an average of every 2.8 miles for each railroad. (R. 174.)

The only fact to which the Piedmont & Northern could point as showing any real difference between its purely local service and the local service of the steam roads was the fact that it has connection with the street railway lines of the Duke owned public utilities companies in some of the cities served (R. 121, 140) and that as a result cars may be moved over city streets instead of over ordinary industrial tracks. However, the Vice-President and General Manager of the Piedmont & Northern testified that its through freight traffic is not carried through the city streets but is carried around belt lines running around the cities (R. 140, 234) and he characterized this service in using street car lines within a city as the "urban operation" as distinguished from the "interurban operation" between cities. (R. 140.)

We repeat that it is entirely unsound for the appellant to attempt to treat the minute differences in a wholly inconsiderable part of its total business as con-

stituting its "distinguishing characteristic" as a railroad. Its distinguishing characteristic is to be found in the essential character of the railroad and of the predominant part of its business.

Point Seven.

The Attempt to Limit the Word "Interurban" to its Etymological Sense, or to Eliminate it Altogether From Consideration in Construing The Statute, And to Make the Word "Electric" The Key to The Construction, Leads Ad Absurdum.

As the District Court says in its opinion (R. 230), the appellant's railroad is "obviously electric." The question is whether it is "interurban" within the meaning of Congress.

The appellant, on its brief, takes the position that because a small part of its business is local station-to-station business it is an "interurban," no matter how extensive may be the predominant part of its business.

This is to argue that Congress gave to the word "interurban" its purely etymological sense of "between cities."

This would render the use of the qualifying word "interurban" entirely meaningless, because all railroads, whether electric or steam, operate between cities and hence are "interurbans" in the strictly etymological sense. And if this sense were intended the same effect would have been produced by the use in Paragraph (22) of the mere words "electric railways" without the qualification "interurban."

Indeed, the appellant on its brief (Point One, page 22) implies that the word "interurban" is not to be interpreted as a word of qualification restricting the scope of the words "electric railways."

The intervenor, National Association of Railroads and Utilities Commissioners, takes the broad position that the words "interurban electric railways" were written into Paragraph (22) pursuant to a lobby demand that all electric railways be excluded, and it argues that therefore when Congress used the words "interurban electric railways" it meant to exclude federal regulation of extensions of all electric railways without qualification. This intervenor asserts (page 55, top, of its brief) that nobody asked Congress to include any electrically operated railways within the provisions of Paragraphs (18) to (21); that somebody did ask that all electrics be excluded, and it argues that this demonstrates that Congress meant to comply with the demand and to exclude all electrics, no matter how large and national might be the scope of their business.

This is to give entirely too much significance to a lobby demand and to overlook the whole spirit of the Act and the remedies sought to be effected and the evils sought to be cured by the legislation.

And yet this argument is perfectly consistent with all the rest of the appellant's argument, since if extensions of a railroad of the character and having a business of the essential nature of the Piedmont & Northern are within the exclusion language of Paragraph (22), then no line whatsoever can be drawn, and any independently operated electric railroad would be free to build any kind of extension without federal supervision. If this be the proper construction of the Act, and if either the Pennsylvania Railroad or the Baltimore & Ohio should completely electrify its line, it would instantly become an "interurban electric railway which is not operated as a part or parts of a gen-

eral steam railroad system of transportation" and would instantly be freed from the provisions of Paragraphs (18) to (21) and released to make unregulated extensions *ad libitum*.

This whole argument, we say, leads to an absurdity. It attributes to Congress a deliberate purpose to discriminate in favor of electric railroads against steam roads. It attributes to Congress an intent to remove altogether from Federal supervision extensions of any railroad motivated by electricity, when in the nature of things electric motive power will come into larger and more extensive use, and when clearly an electrically motivated railroad has all the capacity of a steam road to bring about all the evils of needless expansion and duplication sought to be remedied by the Transportation Act in the interests of the general public.

As a practical matter the only substantial difference between the Piedmont & Northern and a steam railroad is to be found in the character of its motive power. The Congress, we repeat, did not make this the test of exclusion from the provisions of Paragraphs (18) to (21).

Point Eight.

The Argument of the Appellant Based Upon Comparison of The Varying Language of The Different Sections of The Transportation Act And Other Statutes Falls Far Short of The Result That an Electric Railway of The Essential Character of The Piedmont & Northern is Excluded From Federal Regulation as to Extensions as Being an "Interurban Electric Railway."

The principal argument of the appellant here (see its brief, Point Two, pp. 32-41) consists in a very pre-

cise matching up of the varying qualifying language used in connection with the word "interurban" in other parts of the Transportation Act and in other statutes supposedly *in pari materia.*

The argument of the appellant based on the comparison of these various sections goes no further than to reach the conclusion that an "interurban" may still remain an interurban although it derives the majority of its operating revenues from the general transportation of freight.

There may be "general transportation of freight", yet of a purely local station-to-station significance and which is clearly within the regulatory competency of the several states, a matter of local concern rather than national importance, and inconsiderable in its potential or practical effect on the steam railroads and their ability to function efficiently as parts of the system of transportation of the United States as a whole. This would be "general transportation of freight" yet remaining distinctly "interurban" in its character within the meaning which we attribute to that word in the statute.

The argument therefore falls far short of the conclusion that a railroad deriving from 85 to 95 per cent. of its revenue from interstate freight interchanged with steam railroads and moving in carloads all over the United States is an interurban.

It falls far short of the conclusion that an extension to form a new trunk line from Florida to the North, East and West is an extension of an "interurban electric railway."

It falls far short of the conclusion that an extension which would immediately divert such amounts of nationally important freight traffic from the steam

roads as the record here shows, with such serious and injurious results to these steam roads as are here shown, would be an extension of an "interurban electric railway" within the exclusion language of Paragraph (22).

It falls far short of the conclusion which the appellant and the intervenor on its behalf in this record find themselves forced to attempt to draw, that no reasonable line can be drawn and that all independently operated electric railroads are excluded by Paragraph (22).

The District Court aptly dealt with this argument of the appellant as follows (R. 246):

> "* * * But these considerations do not necessarily lead to the conclusion sought to be reached. It is true that an interurban carrier may be entitled to that descriptive name although it participates in general freight traffic; but it does not follow that every electric carrier, so engaged, is an interurban railroad. Freight traffic may be limited in extent and within the scope of a carrier devoted primarily to local business, and at the same time, be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail and express, and yet be so restricted in its operations that it may not be properly classified with general steam carriers whose operations cover a wide field. See the discussion in *Lackawanna & Wyoming Valley Ry.*, 105 I. C. C. 178.
>
> "The difference in language between the exception in Section 15a and the exception in Section 1, Paragraph 22, may not be ignored, but it is accounted for by the fact that in one case Congress was dealing with rates, and in the other, with the construction of new lines. It evidently concluded

that if an electric interurban road should build up a business of transporting property to such an extent as to be engaged in the general transportation of freight, it should be included in the general rate adjustment provided in Section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be engaged in the local carriage of passengers and freight, as its primary business, the extension of its line would remain a matter of local concern and should be left to the regulation of local authority."

Point Nine.

A Proper Application of The Ordinary Canons of Statutory Construction Inevitably Leads to The Conclusion That The Piedmont & Northern is Not an "Interurban Electric Railway" Within The Meaning of The Exclusion Language of Paragraph (22).

We have considered the application of two settled canons of statutory construction to Paragraph (22) as applied to the facts on this record:

1. That in construing the language of the statute it should be construed contextually; and
2. That in construing the language of a remedial statute it is necessary to look to the evils sought to be remedied, to the purposes of the legislation, and to construe the remedial language liberally so as to make it effectuate those purposes by remedying the evils.

A proper application of these rules of construction leads unerringly to the conclusion that the proposed

extensions are not within the meaning of the exclusion language of Paragraph (22).

Another well settled canon of construction leads to the same conclusion, to-wit: That whereas the remedial part of a remedial statute should be liberally construed in order to effectuate the remedy, by the same token exceptions in a remedial statute should be narrowly construed, because such a construction of an exception is equally necessary to give effect to the remedial purposes of the legislation. *Spokane & Inland Empire R. Co. v. United States,* 241 U. S. 344, 350.

The appellant contends for the broadest possible construction of this exception language of Paragraph (22), that it should be held to include all independently operated electric railroads running between cities. It is entirely manifest that such broad construction of exception language would nullify the purposes of the Act as effectually as would a too narrow construction of the remedial provisions. A narrow construction of the exception, in accordance with the rule, instantly rejects this proposed extension as being within the exception. Any kind of ordinary, reasonable construction similarly rejects it.

The District Court pointedly applied this rule of construction as follows:

> "Now it is obvious that the purpose of the law will be defeated by too liberal an interpretation of the term 'interurban electric railway.' It could not be given the broadest of all meanings for it would then comprehend any railway using electric power which runs between cities, without regard to the character or extent of its business. The electrification of steam roads in 1920 had already progressed to a considerable extent and it

cannot be supposed that it was the intent of Congress to except all railroads which should adopt electric motive power from the control of the Commission over new constructions and extensions. On the contrary, it is an elementary rule that exceptions from the general policy embodied in a statute are to be strictly construed and are not to be so interpreted as to destroy its remedial purpose. *Spokane & Inland R. R. v. U. S.*, 241 U. S. 344, 350." (R. 243)

Point Ten.

A Consideration of The History Behind The Transportation Act And The Exception Contained in Paragraph (22) And of The Prior Legislative Proceedings Inevitably Leads to The Conclusion That This Extension Project of The Piedmont & Northern is Not Within The Exclusion Language of Paragraph (22).

Paragraphs (18) to (21) owe their origin to the conclusion of Congress, based upon committee investigations, that there existed a need for federal supervision over capital investments and railroad extension and for the imposition of restraint upon extensions which would invade the traffic areas and unnecessarily deplete the earnings of other lines, it being recognized that ill-considered and uneconomic expenditures for new construction of one carrier, affecting the income and increasing the unit cost of transportation of its competitor, could readily impair the ability of either or both carriers to keep their interstate lines in efficient operation and to perform properly their respective parts in the nation's railroad business.

The wisdom of thus restricting the construction of new lines of railroads or extensions was recognized

by the legislatures of many states long before the enactment of the Transportation Act. New York, Illinois, Wisconsin, Pennsylvania, Kansas, and several other states, had passed statutes requiring a showing of "public convenience and necessity", as a prerequisite to the building of railroad lines. As early as 1894 we find a case arising under the public convenience and necessity section of the general law of the State of New York, *In re New Hamburg & P. C. R. Co.*, 27 N. Y. S. 664.

In a case decided the following year (1895), *In re Amsterdam, J. & G. R. Co.*, 33 N. Y. S. 1009, the court said:

> "The privilege of constructing and operating a railroad is not one that exists in the incorporators as a common right; it is a privilege or franchise that is granted by the state, and can only be obtained by complying with the laws adopted by the state regulating the granting of such franchises. Prior to the enactment of section 59 of chapter 676 of the laws of 1892 it was within the power of 15 or more citizens to form a railroad corporation, and to lay its tracks through any section, upon securing from the property owners the necessary right of way. This section affected a change. It was evidently intended to restrict the building of roads not actually needed, in order to protect, not only existing railroads, but also citizens from investing in alluring but profitless enterprises. The propriety and necessity of constructing a road was not left to be determined by enterprising but perhaps ill-informed or ill-advised citizens, or by those seeking by threats of destructive competition to levy tribute upon existing roads, but was placed in the hands of accredited officers of the state, who should act for and in its behalf in determining whether the in-

> terests of the state and of the community immediately affected would be promoted by the building of a road. Provisions had theretofore been made, to be hereafter referred to, for the correction of abuses in the management of roads already constructed, so that it was no longer necessary to correct evils in the management of existing roads by constructing competing ones."

Similar statements of the purposes of the statutes requiring certificates of public convenience and necessity as a prerequisite to the building of new lines of railroads or extensions are to be found in the following cases:

In re Long Lake R. Co., 42 N. Y. S. 125; *In re Kings, Q. & S. R. Co.*, 39 N. Y. S. 1004; *People ex rel. Steward v. Board of Railroad Commissioners*, 58 N. Y. S. 94; *In re Rochester, C. & E. Traction Co.*, 102 N. Y. S. 1112; *In re Auburn & W. Ry. Co.*, 55 N. Y. S. 895; *People ex rel. N. Y. Central & H. R. Co. v. Public Service Comm.*, 88 N. E. 261 (N. Y., 1909); *People v. Public Service Comm.*, 125 N. E. 438 (N. Y., 1919); *Roy v. Illinois Commerce Comm.*, 153 N. E. 648 (Ill., 1926); *In re Eastern Ry Co. of Minnesota*, 116 N. W. 841 (Wis., 1908); *In re Milwaukee Railway Electric & Light Co.*, 206 N. W. 201 (Wis., 1925).

These state laws requiring a showing of public convenience and necessity as a condition precedent to the building of new lines of railroad or extensions formed the background for a similar federal statute and had their influence upon Congress in the enactment of the Transportation Act. They were referred to by the chairmen of both the Senate and the House committees, which were considering the public convenience and necessity provisions of the bill which finally was

passed as the Transportation Act, and which provisions were written into the bill in response to the recommendation of the Interstate Commerce Commission, urged upon Congress through its representative, Commissioner Clark.

In explaining before the House Committee the necessity for placing the matter of the construction of new lines and track extensions under the jurisdiction of the Commission, Commissioner Clark made the following statement:

> "The idea is to prevent the building of duplicate lines of railroad because of keen rivalry of certain financial interests or when the railroads so built will not serve the present or future convenience and necessity, and *will simply depend for traffic upon that which they can get away from the railroads already built,* adding to the total burden of maintenance, capital returns, etc., which the public must pay." (Report of House Committee Hearings on H. R. 4378, Vol. 1, page 14.) (Italics ours.)

Continuing, in response to questions by Representative Rayburn of Texas, who inquired whether the proposal with reference to authorizing the Commission to require extensions was not of almost as great importance as the proposition of denying the right to extensions where they are applied for, Commissioner Clark said:

> "Oh, yes. I think it is simply rounding out the enforcement of the principle underlying this, *that a railroad having entered a given field shall be protected against unreasonable competition by the construction of another line that is not needed.* The public would be protected against the obligation to

> maintain two lines where one was sufficient, and would be further protected in that the carrier having entered that field would be required to occupy it further, in so far as the public interest required." (Vol. 1, p. 123, *supra.*) (Italics ours.)

Commissioner Clark further stated that the capital for new railroad construction could be more readily obtained if there were protection against unnecessary competition, or the assurance that if a railroad is built it will be "protected against what I might term *piratical building* by a competitor of a road that is not needed." (Vol. 1, p. 98, *supra.*) (Italics ours.)

Speaking of the same provisions of the Act, the Chairman of the House Committee on Interstate Commerce, in presenting his report before the House Committee of the Whole, said:

> "We can get better service by strengthening the existing lines than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments." (Congressional Record, Vol. 58, p. 8313.)

And Senator Cummins, Chairman of the Senate Committee on Interstate Commerce, referring to the same provisions of the Act, said on the floor of the Senate:

> "The purpose of this provision in the bill is to recognize as the controlling consideration the right and interest of the public to have reasonable and adequate transportation facilities and to escape payment for transportation facilities that are not needed and are mere duplication of existing facilities." (Congressional Record, Vol. 59, p. 863.)

One of the first cases in which the courts undertook to construe paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act, as amended, was *Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co.*, 286 Fed. 540. In this case the Court said:

> "It is certain that the purpose actuating Congress in adding to the Interstate Commerce Act the provisions herein involved, was, as was pointed out by Interstate Commerce Commissioner Clark while speaking before the Committee on Interstate and Foreign Commerce of the House of Representatives, when such committee was considering the enactment of these amendatory provisions, and shortly before such enactment, 'to prevent the building of duplicate lines of railroad because of keen rivalry of certain financial interests, or when the railroads so built will not serve the present or future convenience and necessity, and will simply depend for traffic upon that which they can get away from railroads already built, adding to the total burden of maintenance, capital returns, etc., which the public must pay.'
>
> "Congress had in mind and was endeavoring to correct the disastrous evils, to both the railroads and the public, which for many years had attended the construction of lines of railroad, main and branch, in ruinous competition with each other and with resultant injury to the public, which was compelled to bear the inevitable consequences of such a situation."

When Congress excluded "interurban electric railways—not operated as a part or parts of a general steam railroad system of transportation" from the requirements of Paragraphs (18) to (21) of Section 1 of the Act, it must have had in contemplation interurban electric railways in the sense the term is com-

monly understood. The history of the enactment shows this conclusively. It meant to exclude such lines as physically and due to character of business could not and would not create the evils sought to be prevented.

The limitation upon the authority of the Commission over the construction and extension of lines of railroad was urged upon the Committee on Interstate and Foreign Commerce of the House of Representatives, in the deliberations upon House Bill 4378, by Mr. Charles E. Elmquist, President and General Solicitor of the National Association of Railroad and Public Utility Commissioners. In recommending that an exception be made in the case of interurban electric railways, he said:

> "The same amendment refers to electric interurban lines. There are a great many electric interurban lines, the average length of which in this country is about 48 miles. Generally speaking, *they perform a local service under the laws of the State. They are subject to the regulatory powers of the local commissions.* We can see no good reason for transferring to the Interstate Commerce Commission the power to determine the extension or the abandonment of those lines which *are specially designed to take care of local service.* You are trying to take care of evils or injuries and it strikes us that you are imposing a greater hardship upon the public, and, perhaps, upon the industry itself, in asking the interested bodies to come here to Washington to have those matters disposed of." (Report of House Committee Hearings on H. R. 4378, Vol. 9, page 1613.) (Italics ours.)

How strikingly different were these representations to Congress made by this National Association of Rail-

road and Public Utility Commissioners from the contention here made by the same association as intervenor in this cause, that "interurban electric railways" means all electric railways, no matter how extensive their scope.

See also the letter from the American Electric Railway Association, Committee of National Relations, addressed to Senator Cummins, in which it is stated:

> "The distinction between steam and electric interurban roads is well known and is constantly recognized by the courts, Congress, and the several State legislatures in dealing with the transportation question. Upward of 60 per cent of all electric railway mileage in the country is strictly city mileage, *and not to exceed 5 per cent of the gross earnings of all electric railways, city, suburban and interurban, is derived from interstate traffic.*
>
> "No one will contend that city electric railways are to be classed, for purposes of operation, with steam railroads. *The interurban electric railways are, to a large extent, affected by their local surroundings; they must depend largely upon revenue earned from local communities served,* and they are affected to a greater extent by the competition of motor vehicles, they must be considered by themselves." (Volume 18, *ibid*, page 3418) (Italics ours.)

And see resolutions adopted by Associations of Business Organizations of Los Angeles which recites:

> "Whereas, these interurban and street railway companies must depend upon revenues earned from local communities served, their operations are very different from those of the steam lines; they are subject to certain limitations under fran-

> chises and the competition of motor vehicles of all kinds as to their rates of fare and freight rates; * * *" (Volume 19, *ibid*, page 3554.)

All this goes to show that Congress, when it excepted "interurban electric railways", did not have in contemplation lines of railroads which differ from steam roads only in motive power, but that instead it only contemplated actual interurbans performing a local service. It shows that certainly such an extension as that here involved, of a railroad of the character of the Piedmont & Northern, was not contemplated.

To hold that the Piedmont & Northern can escape the jurisdiction of the Commission on the theory that it is an interurban electric railway would be to nullify in their entirety Paragraphs (18) to (21). *It would follow that any railroad in the country, desiring to reach a particular territory, and doubting its ability to obtain a certificate of public convenience and necessity, has only to charter an independent company, build an electric line and operate it by electric motive power.*

Undoubtedly, the Interstate Commerce Commission correctly interpreted the term "interurban electric railway" in its report in the case of *Proposed Control of Sacramento Northern Railway by W. P. R. Co.*, 71 I. C. C. 653, where it said:

> "We are by no means convinced, however, that the Northern is an interurban electric railway as that term is used in the statute. Much of the transportation service rendered by it, no doubt, is similar to that rendered by electric interurban railways. The service of such railways, however, *is distinguished by its local and limited character and the fact that the bulk of their revenues are derived from the transportation of passengers.* Their

facilities for handling freight are usually inadequate or lacking so as to disable them from engaging in its general transportation. The amount of business interchanged by them with connecting carriers is ordinarily very small.

"Congress obviously did not intend to exclude all electric railways from the operation of section 20a. If the Western Pacific were to completely electrify its system it would not thereby become a 'street, suburban, or interurban electric railway.' Some of its operations might partake of the nature of street, suburban, or interurban railway service, but its business as a whole would be of a far broader character. Similarly, it appears from the facts of record that the Sacramento Northern is more than an interurban carrier as that term is generally understood.

"Since the time of its organization its revenues from freight, mail, and express have exceeded those received from the transportation of passengers. *Indeed, its revenue from freight alone has been practically equal to its passenger revenue.* Its total first-track main-line mileage is 165.03 as compared with which its mileage of yard track and sidings is 41.49. The relatively large total of yard and sidings is not explained, but it is a fair presumption that most of it is required in connection with freight service. In the language of the application, 'the more important part of its business consists of through passenger and freight business' interchanged with various trunk lines. It is engaged in the general transportation of passengers and freight and conducts its business substantially in the same manner as any steam railroad engaged in such transportation. The fact that it is operated electrically does not, therefore, in our opinion, remove it from our jurisdiction under section 20a." (Italics ours.)

It is to be noted that the language used in Section 20a in excepting from the requirements of said section interurban electric railways is exactly the same as that used in Paragraph (22) of Section 1, and the *Sacramento Northern Case* is, therefore, directly in point.

Point Eleven.

The Case of United States v. Village of Hubbard, 266 U. S. 474, Relied on by the Appellant, is not Authority for the Interpretation Contended for.

The holding in the case of *United States v. Village of Hubbard, supra,* was to include interurbans within, rather than to exclude them from, the regulatory jurisdiction of the Commission.

Nowhere in the opinion in that case is there an intimation that an electrically operated freight carrier of the national importance of the Piedmont & Northern is to be deemed an "interurban" within the meaning of Paragraph (22) or of any other of the statutory provisions referred to. Nowhere in the opinion is there any intimation that the court considered that, under the guise of extensions of an "interurban electric railway", it is open to an independently operated freight carrier of the character of the Piedmont & Northern without federal supervision to connect up with two steam roads and form a new paralleling and competing trunk line of carriers of the scope and national importance shown to be proposed on this record.

The only significance of that case here from the standpoint of the appellant seems to be that the court said (pp. 479-480): "Transportation Act, 1920, c. 91, 41 Stat. 456, enlarged in several respects, the powers of the Commission, and dealt also in other ways with

carriers engaged in interstate commerce. In doing so, it provided expressly in five sections for the exclusion of certain electric railways from the operation of the powers conferred; and it also differentiated interurban electric railways from street and suburban railways by specific reference to each, although a distinction in treatment was made in only one case"; and that the court appended to this passage of the opinion foot-note 7 in which it matched up the varying provisions of Section 422 (15a); Section 402; Section 439 (20a); Section 209; and Section 300.

In doing this the court merely placed the sections side by side and adverted to internal distinctions between urban, suburban and interurbans, and between various kinds of interurbans, *all of them within the language of the various sections.*

The court did not have its attention upon and was not considering the outside dividing line between "interurbans," variously excepted or not excepted by the varying qualifying language of the five sections of the Act, and those electric railways which are outside any reasonable classification as "interurbans" and hence excluded from federal regulation by none of the sections referred to. It is that outside dividing line which is to be surveyed here.

There was in that case no intimation that the court considered that all electric railways are within the term "interurban" as used with divers qualifications in all five sections.

Foot-note 4 to the opinion is far more significant of what the court understood to be included within the general term "interurban," since it points out that of 267 operating "interurbans" which filed reports for 1917, 40 did not report any freight revenue, and that of

the total revenue of the 267, only 9.4 per cent was freight revenue.

Manifestly the court in referring to "interurbans" was referring to a class of railroads vastly different in character from the Piedmont & Northern.

We submit that it is the later decision in the Santa Fe case, construing this very exclusion clause of Paragraph (22), and not the decision in the Hubbard case passing upon a wholly different question, which is in point and controlling here.

Point Twelve.

The Appellant's Assumption—"Once an Interurban, Always an Interurban"—is Wrong. The Court Below Correctly Held That Whatever may Have Been its Character Originally, the Piedmont & Northern has Long Since Invaded the National Field of Transportation to the Extent That it has Clearly Stepped out of the "Interurban" Class.

Perhaps having in mind the sound of the ancient maxim "once a mortgage, always a mortgage," the appellant contends that an "interurban" has the same sort of incapacity for change.

On the facts of this record, appellant was never an interurban within the statutory meaning. It was incorporated as a general railroad, not as an interurban, with power to use any motive power it might choose, and with power to buy, lease, own and operate the franchises and properties of any steam railroad in any states. Its choice of electric motive power was of course dictated by the fact that the great Duke interests which own it also own the great hydro-electric developments of the Piedmont Carolinas. It

was launched, not as an interurban, but as the freight transportation enterprise of this great commercial and industrial combination to carry the freight of its masters and of its allied fellow servants and to carry all other outside freight of the territory upon which it could lay its hands by ordinary competition, or by the extraordinary competition furnished by its strategically chosen board of industrialist directors and by the ramifying powers of the Duke interests to influence and control freight to their railroad through stock ownership, power contracts, warehouse traffic agreements, merchandise buying power, and the wide-spreading and powerful influence of the Duke Endowment benevolence to universities, colleges, schools, hospitals, churches, and superannuated Protestant ministers of the territory.

In the outset it began as a freight carrying railroad of national importance and since then its local business has become of less and less, and its national business of more and more, importance.

But if all this were not so, there is no justification for the theory that an interurban as such cannot grow into something else and thereby step into the field of national regulation. The appellant and the intervenor on its behalf argue that if this were so an interurban might be such one day and the next day might change its character; that it would not be able without litigation to determine its own character. This is but the type of the practical trouble always inherent in drawing the line frequently surveyed with difficulty, and only by the gradual process of judicial inclusion and exclusion, between the fields of state and national power.

A logging road, lying wholly within a state and not

engaging in interstate commerce would be wholly within the power of the state. But if it should extend the scope of its operations and begin to carry interstate commerce it would change its character and come within federal power. Just so an interurban might change by changing the essential character of its business.

We submit that the District Court correctly held (R. 251):

> "It is our conclusion that the more recent rulings of the Commission conform to the purpose of the statute and point the way to the correct classification of the Piedmont and Northern. Its freight traffic dominates so completely the field of its operations, and reaches so far, through interchange with other railroads, that it is outside the class which Congress intended to exclude from the control of the Commission. Even if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so similar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent."

Point Thirteen.

The Decision of the United States Labor Board Construing Section 300, and the use of Somewhat Similar Language by Congress in the Subsequent Railway Labor Act of May 20, 1926, Cannot be Construed as an Adoption by Congress of the Labor Board's Interpretation and as a Retroactive Declaration That the Language Used in the Transportation Act had the Meaning Attributed to Similar Language by the Labor Board.

The appellant places some reliance upon the decision of the former Labor Board in *Brotherhood of Locomo-*

tive Engineers, et al., v. Spokane & Eastern Railway, et al., decision No. 33 (docket 26-a, December 11, 1920) wherein that Board held that the Piedmont & Northern and certain other electric carriers were excluded from the Board's jurisdiction as being "street, interurban, and suburban electric railway (s) not operated as a part of a general railroad system of transportation."

Appellant, of course, does not rely on this decision as authority, but only treats it as having some persuasive effect. The Labor Board was passing upon another statute, dictated by other considerations. Its decision does not compare, for persuasive force, with the decision of the Interstate Commerce Commission in this very case that the Piedmont & Northern is not an "interurban electric railway" within the meaning of Paragraph (22).

The Labor Board's decision is very far from having the persuasive force of the decision of the District Court in this suit, two circuit judges and one district judge sitting.

However, the appellant argues that since the language of Section 300 construed by the Labor Board was substantially similar to the language of Paragraph (22), and since thereafter, upon the abolition of the Labor Board, and the enactment of the Railway Labor Act of May 20, 1926, the latter act used exclusion language substantially similar to that contained in Section 300 of the Transportation Act, it must be construed that Congress, being advertent to the construction placed upon Section 300 by the Labor Board, adopted that construction in incorporating substantially similar language in the Railway Labor Act of May 20, 1926, and thereby retroactively declared that meaning to have been intended in the prior use of sub-

stantially similar language in Paragraph (22) of the Transportation Act of 1920.

The Labor Board was not a court. Its decision has no significance for the application of the well-settled principle that the adoption by a legislature of a statute previously enacted by another legislature, and which previous statute has received definite judicial construction, constitutes an adoption by the second legislature of the judicial construction theretofore placed upon the act of the first legislature.

We submit that the doctrine announced in *Alexander v. The Mayor and Commonalty of Alexandria*, 5 Cranch, 1, 7, 8, cited on page 67 of appellant's brief, has no application to this situation. That doctrine is that if in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases; that consequently if a subsequent act on the same subject affords *complete demonstration* of the legislative sense of its own language, the subsequent should be incorporated into the previous act in expounding the previous act.

But the language of the Railway Labor Act of May 20, 1926, is no more explicit or definitive than the language of Paragraph (22) enacted in 1920, and offers no more of a demonstration as to the legislative meaning.

The doctrine relied upon would not justify the argument that the decision by the Labor Board construing similar language of Section 300, the decision being made after the passage of the Transportation Act of 1920, had a retroactive effect on what Congress meant in 1920 in writing Paragraph (22). Nor can it be

deemed that the use in 1926 by Congress of substantially similar language in a new railway labor act, no more definite or expository as to its meaning than was Paragraph (22), had the effect to adopt the intervening construction placed on language of a repealed statute by a no-longer existent administrative board having once had jurisdiction over a subject-matter quite different from that covered by Paragraph (22).

We submit that the decision by the Labor Board has no persuasive force.

Point Fourteen.

Regardless of the View Which This Court may Entertain as to the Construction of the Words "Interurban Electric Railway", the Decree below Should be Affirmed as Ultimateley Correct, for That, in any Event, the Suit Should Have Been Dismissed on Either or Both of the Following Grounds: 1. That the Piedmont & Northern, Even if an Interurban, is and Would be "Operated as a Part or Parts of a General Steam Railroad System of Transportation"; and 2. The Commission's Order is a Negative Order, Not Subject to Injunction by the Courts Under the Urgent Deficiencies Act.

(1.) EVEN IF DEEMED AN "INTERURBAN", THE PIEDMONT & NORTHERN IS, AND IF EXTENDED, WOULD BE, "OPERATED AS A PART OR PARTS OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION" WITHIN THE MEANING OF PARAGRAPH (22) AND ON THIS GROUND THE COMMISSION HAD JURISDICTION.

The court below adopted the view of the Piedmont & Northern as to the meaning of the additional qualifying language, "not operated as a part or parts of a

general steam railroad system of transportation." The United States and the intervening defendants did not except or appeal from this holding. However, our view has always been that this language does not have the meaning in the statute, attributed to it by the appellant and by the District Court, and that its decree dismissing the bill on the ground that the Commission had jurisdiction of the application for a certificate, might equally well have been predicated on the ground that the Piedmont & Northern, even if held to be an interurban, is and would be "operated as a part or parts of a general steam railroad system of transportation", within the legislative meaning as to that language.

The record shows, beyond peradventure, that the Piedmont & Northern is now operated, and if extended as proposed, would be operated, distinctly as an important part of the general steam railroad system of transportation of the United States.

We do not think that by the use of the word "system", Congress intended to refer to corporate ownership and operation. We think it was outlining the same line of distinction for which we have argued on the question of the construction of the word "interurban," to wit: the distinction between that which is of local significance and that which is of national importance. We think that Congress intended that even in the case of a railroad within the class of "interurbans", if it be operated as a freight carrier, and as a part of the general steam railroad system of transportation of the country, its proposed extension should be within the jurisdiction of the Commission. The other construction, we think, gives entirely too much force to the use of the indefinite article "a", rather than the definite article, "the".

The railroad system of the United States is a general steam railroad system of transportation, and it was that system which Congress was undertaking to foster and preserve by enacting the Transportation Act.

The language is *not* "not operated as a part of a *steam railroad*" but *is* "not operated as a part or parts of a *general* steam railroad *system* of transportation". We do not think Congress would have used the word "general" if it had intended by "system" to imply merely a particular system operated under one corporate control.

In *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy,* 257 U. S. 563, this court, in expounding the purposes of the Transportation Act, said (589):

> "Congress, in its control of its interstate commerce *system,* is seeking, in the Transportation Act, to make the *system* adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does." (Italics ours.)

The use by the court in that case of the word "system" did not imply lines of railroad owned by one corporate entity, but implied the "general steam railroad system of transportation" of the United States. We think the words in Paragraph (22) have the same meaning. This court used the word "system" as referring to the railroad system of the United States in its opinions in *New England Divisions Case,* 261 U. S. 184, 190; and in *Dayton-Goose Creek Railway v. United States,* 263 U. S. 456, 477, 478, 480 and 485.

(2) In any Event, the Decree Should be Affirmed and the Appeal Dismissed on the Ground that the Commission's Order is a Negative Order, Not the Subject of Injunction of the Courts under the Urgent Deficiencies Act.

The defendants have not excepted and appealed from the refusal of the District Court to grant the motion to dismiss (R. 97-98) on the ground that the order of the Commission sought to be enjoined, annulled and set aside is a negative order, not the subject of injunction as decided in *Procter and Gamble v. United States,* 225 U. S. 282.

This point will be fully argued in the briefs of the United States and of the Interstate Commerce Commission. Without elaboration, we state our views briefly and adopt the arguments made on this point by the United States and the Commission.

This motion goes, not to the merits as to the jurisdiction of the Commission, but to the jurisdiction of the court, and could be raised here without exception.

The court below disposed of the case on its merits and we hope this court will.

However, in any event there was no reversible error in the decree below, whatever this court may decide on the merits, since if not dismissed on the merits the bill should have been dismissed on the motion.

The Commission has already refused certificate of public convenience and necessity. There is no threat to repeat the refusal. The courts cannot enjoin this past act.

The Commission has already held that it had jurisdiction of the application for certificate. There is no threat of a future such holding. Again the courts can-

not enjoin a past holding by the Commission that it has jurisdiction.

The holding by the Commission that the Piedmont & Northern is not an interurban excepted by Paragraph (22) has not changed its status. If this holding was erroneous, the status of the Piedmont & Northern as such interurban would remain unchanged.

If it is not an interurban, the penalties under which it would come for extending without a certificate are penalties which flow, not from the order of the Commission, but from the statute.

The Commission's order does not enjoin the Piedmont & Northern to do or not to do any act. It simply refuses a certificate. What the appellant refers to as "the affirmative part of the order," the holding that the Commission has jurisdiction, is no more than what would have been implied in the order had the Commission said nothing about its jurisdiction but merely made a finding on public convenience and necessity and denied the certificate. Any exercise of jurisdiction by a tribunal is tantamount to an express assertion of its jurisdiction in the premises, and the express assertion adds nothing. The order here involved is a negative order.

CONCLUSION.

In conclusion, we submit that the question of construction involved on this appeal is not a problem of strained, critical subtlety, or of lexicographical or etymological definition. It is a practical problem, like all problems of power. Looking at the language in a practical view, in the light of ordinary meaning, and at the same time considering the purposes of the Transportation Act, the mind instantly rejects the theory

that such an extension as here proposed, of such a railroad as the Piedmont & Northern, is the extension of an "interurban electric railway" exempted from Federal regulation by Paragraph (22). We submit that the decree below should be affirmed.

Respectfully submitted,

L. E. JEFFRIES,
S. R. PRINCE,
S. S. ALDERMAN,
Solicitors for Southern Railway Company.

JAS. F. WRIGHT,
Solicitor for Seaboard Air Line Railway Company.

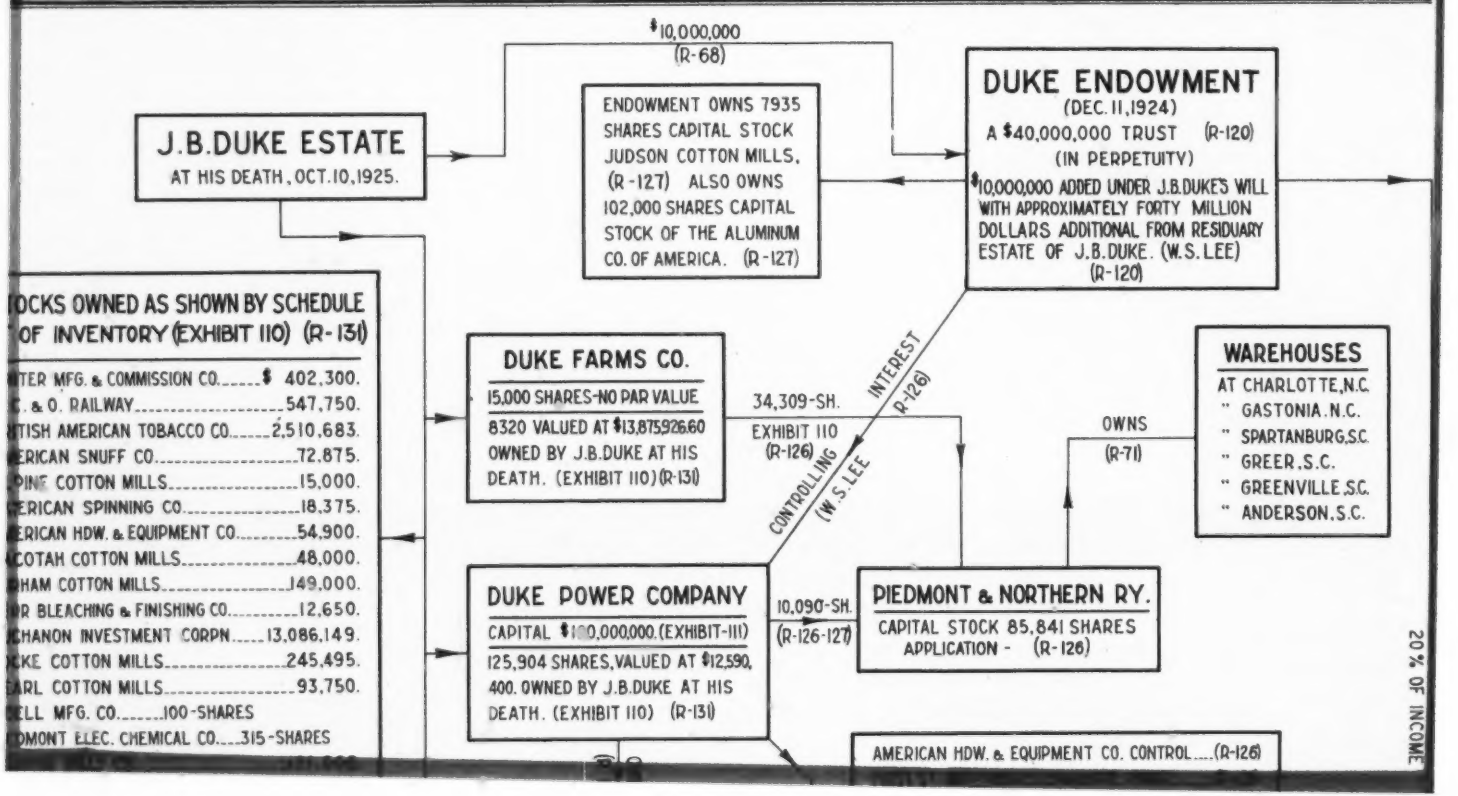
CARL H. DAVIS,
F. B. GRIER,
Solicitors for Charleston & Western Carolina Railway Company.

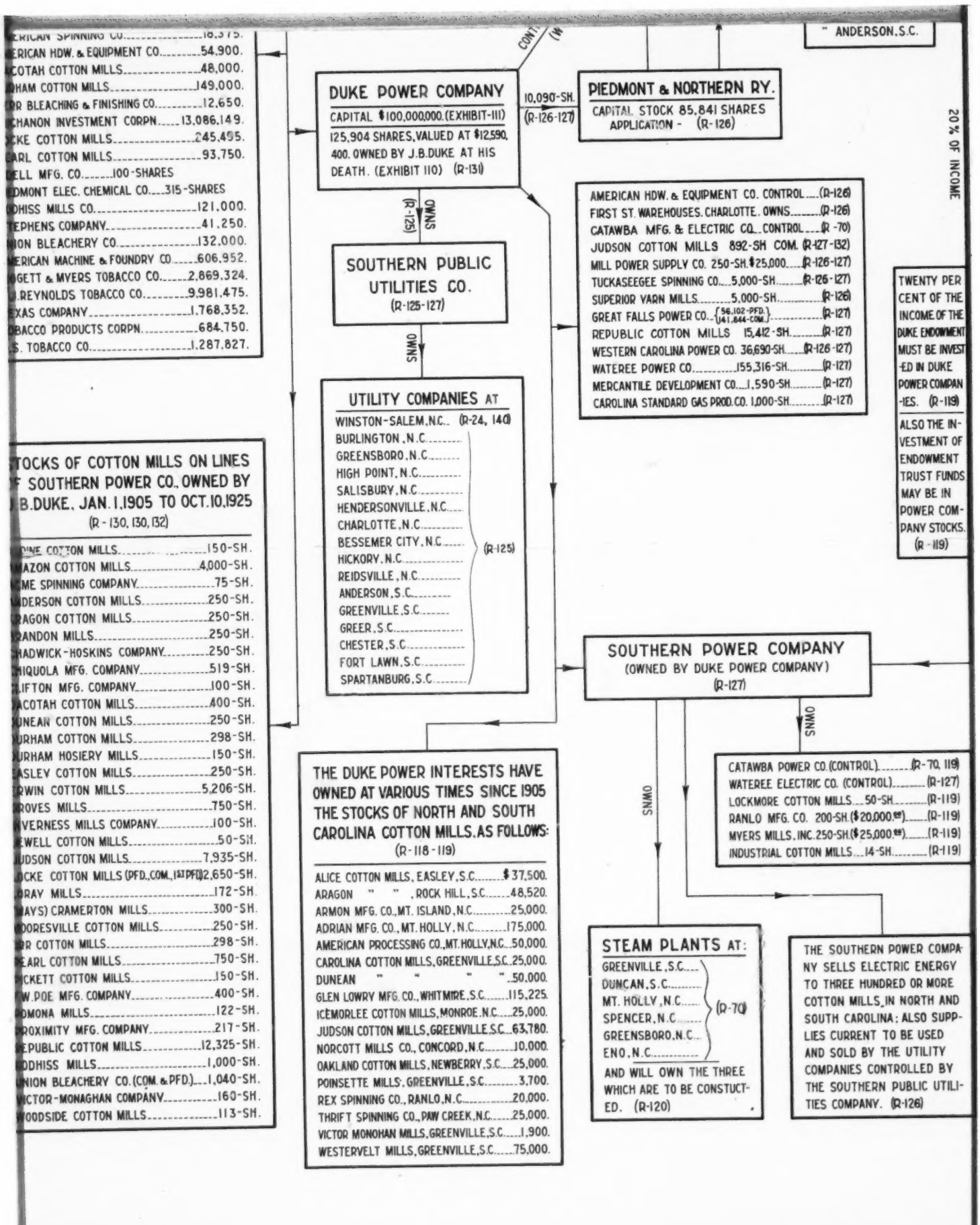
CARL H. DAVIS,
Solicitor for Atlantic Coast Line Railroad Company.

EDWARD S. JOUETT,
WM. C. BURGER,
Solicitors for Louisville & Nashville Railroad Company.

JAMES J. MCLAUGHLIN,
Solicitor for Carolina, Clinchfield & Ohio Railway, Carolina, Clinchfield & Ohio Railway of South Carolina, and Clinchfield Northern Railway of Kentucky.

INTER RELATIONSHIPS OF
DUKE ENDOWMENT, J.B.DUKE ESTATE, DUKE POWER COMPANY,
PIEDMONT AND NORTHERN RAILWAY AND OTHER CONTROLLED OR AFFILIATED INTEREST.




ERICAN SPINNING CO. 16,375.
ERICAN HDW. & EQUIPMENT CO. 54,900.
ACOTAH COTTON MILLS 48,000.
DHAM COTTON MILLS 149,000.
DR BLEACHING & FINISHING CO. 12,650.
CHANON INVESTMENT CORPN. 13,086,149.
CKE COTTON MILLS 245,495.
EARL COTTON MILLS 93,750.
ELL MFG. CO. 100-SHARES
EDMONT ELEC. CHEMICAL CO. 315-SHARES
DDISS MILLS CO. 121,000.
TEPHENS COMPANY 41,250.
NION BLEACHERY CO. 132,000.
MERICAN MACHINE & FOUNDRY CO 606,952.
GETT & MYERS TOBACCO CO. 2,869,324.
J. REYNOLDS TOBACCO CO. 9,981,475.
EXAS COMPANY 1,768,352.
OBACCO PRODUCTS CORPN. 684,750.
S. TOBACCO CO. 1,287,827.
" ANDERSON, S.C.
CONT. (W
DUKE POWER COMPANY
CAPITAL $100,000,000. (EXHIBIT-111)
125,904 SHARES, VALUED AT $12,590,400. OWNED BY J.B. DUKE AT HIS DEATH. (EXHIBIT 110) (R-131)
10,090-SH. (R-126-127)
PIEDMONT & NORTHERN RY.
CAPITAL STOCK 85,841 SHARES
APPLICATION - (R-126)
20% OF INCOME
(R-125) OWNS
SOUTHERN PUBLIC UTILITIES CO.
(R-125-127)
SNMO
AMERICAN HDW. & EQUIPMENT CO. CONTROL (R-126)
FIRST ST. WAREHOUSES, CHARLOTTE. OWNS (R-126)
CATAWBA MFG. & ELECTRIC CO. CONTROL (R-70)
JUDSON COTTON MILLS 892-SH COM. (R-127-132)
MILL POWER SUPPLY CO. 250-SH. $25,000 (R-126-127)
TUCKASEEGEE SPINNING CO. 5,000-SH (R-126-127)
SUPERIOR YARN MILLS 5,000-SH (R-126)
GREAT FALLS POWER CO. {56,102-PFD. / 41,844-COM.} (R-127)
REPUBLIC COTTON MILLS 15,412-SH. (R-127)
WESTERN CAROLINA POWER CO. 36,690-SH. (R-126-127)
WATEREE POWER CO. 155,316-SH. (R-127)
MERCANTILE DEVELOPMENT CO. 1,590-SH. (R-127)
CAROLINA STANDARD GAS PROD. CO. 1,000-SH. (R-127)
TWENTY PER CENT OF THE INCOME OF THE DUKE ENDOWMENT MUST BE INVESTED IN DUKE POWER COMPANIES. (R-119)
ALSO THE INVESTMENT OF ENDOWMENT TRUST FUNDS MAY BE IN POWER COMPANY STOCKS. (R-119)
UTILITY COMPANIES AT
WINSTON-SALEM, N.C. (R-24, 140)
BURLINGTON, N.C.
GREENSBORO, N.C.
HIGH POINT, N.C.
SALISBURY, N.C.
HENDERSONVILLE, N.C.
CHARLOTTE, N.C.
BESSEMER CITY, N.C.
HICKORY, N.C.
REIDSVILLE, N.C.
ANDERSON, S.C.
GREENVILLE, S.C.
GREER, S.C.
CHESTER, S.C.
FORT LAWN, S.C.
SPARTANBURG, S.C.
(R-125)
STOCKS OF COTTON MILLS ON LINES OF SOUTHERN POWER CO., OWNED BY J.B. DUKE, JAN. 1, 1905 TO OCT. 10, 1925
(R-130, 130, 132)
DINE COTTON MILLS 150-SH.
MAZON COTTON MILLS 4,000-SH.
ME SPINNING COMPANY 75-SH.
NDERSON COTTON MILLS 250-SH.
RAGON COTTON MILLS 250-SH.
RANDON MILLS 250-SH.
RADWICK-HOSKINS COMPANY 250-SH.
CHIQUOLA MFG. COMPANY 519-SH.
CLIFTON MFG. COMPANY 100-SH.
CACOTAH COTTON MILLS 400-SH.
DUNEAN COTTON MILLS 250-SH.
URHAM COTTON MILLS 298-SH.
URHAM HOSIERY MILLS 150-SH.
EASLEY COTTON MILLS 250-SH.
ERWIN COTTON MILLS 5,206-SH.
GROVES MILLS 750-SH.
INVERNESS MILLS COMPANY 100-SH.
EWELL COTTON MILLS 50-SH.
JUDSON COTTON MILLS 7,935-SH.
LOCKE COTTON MILLS (PFD., COM., 1ST PFD.) 2,650-SH.
LORAY MILLS 172-SH.
(MAYS) CRAMERTON MILLS 300-SH.
OORESVILLE COTTON MILLS 250-SH.
OR COTTON MILLS 298-SH.
PEARL COTTON MILLS 750-SH.
PICKETT COTTON MILLS 150-SH.
R.W. POE MFG. COMPANY 400-SH.
POMONA MILLS 122-SH.
PROXIMITY MFG. COMPANY 217-SH.
REPUBLIC COTTON MILLS 12,325-SH.
RIDDISS MILLS 1,000-SH.
UNION BLEACHERY CO. (COM. & PFD.) 1,040-SH.
VICTOR-MONAGHAN COMPANY 160-SH.
WOODSIDE COTTON MILLS 113-SH.
THE DUKE POWER INTERESTS HAVE OWNED AT VARIOUS TIMES SINCE 1905 THE STOCKS OF NORTH AND SOUTH CAROLINA COTTON MILLS. AS FOLLOWS:
(R-118-119)
ALICE COTTON MILLS, EASLEY, S.C. $37,500.
ARAGON " " , ROCK HILL, S.C. 48,520.
ARMON MFG. CO., MT. ISLAND, N.C. 25,000.
ADRIAN MFG. CO., MT. HOLLY, N.C. 175,000.
AMERICAN PROCESSING CO., MT. HOLLY, N.C. 50,000.
CAROLINA COTTON MILLS, GREENVILLE, S.C. 25,000.
DUNEAN " " " " 50,000.
GLEN LOWRY MFG. CO., WHITMIRE, S.C. 115,225.
ICEMORLEE COTTON MILLS, MONROE, N.C. 25,000.
JUDSON COTTON MILLS, GREENVILLE, S.C. 63,780.
NORCOTT MILLS CO., CONCORD, N.C. 10,000.
OAKLAND COTTON MILLS, NEWBERRY, S.C. 25,000.
POINSETTE MILLS, GREENVILLE, S.C. 3,700.
REX SPINNING CO., RANLO, N.C. 20,000.
THRIFT SPINNING CO., PAW CREEK, N.C. 25,000.
VICTOR MONOHAN MILLS, GREENVILLE, S.C. 1,900.
WESTERVELT MILLS, GREENVILLE, S.C. 75,000.
SOUTHERN POWER COMPANY
(OWNED BY DUKE POWER COMPANY)
(R-127)
SNMO
SNMO
CATAWBA POWER CO. (CONTROL) (R-70, 119)
WATEREE ELECTRIC CO. (CONTROL) (R-127)
LOCKMORE COTTON MILLS 50-SH. (R-119)
RANLO MFG. CO. 200-SH. ($20,000.00) (R-119)
MYERS MILLS, INC. 250-SH. ($25,000.00) (R-119)
INDUSTRIAL COTTON MILLS 14-SH. (R-119)
STEAM PLANTS AT:
GREENVILLE, S.C.
DUNCAN, S.C.
MT. HOLLY, N.C.
SPENCER, N.C.
GREENSBORO, N.C.
ENO, N.C.
(R-70)
AND WILL OWN THE THREE WHICH ARE TO BE CONSTUCTED. (R-120)
THE SOUTHERN POWER COMPANY SELLS ELECTRIC ENERGY TO THREE HUNDRED OR MORE COTTON MILLS, IN NORTH AND SOUTH CAROLINA; ALSO SUPPLIES CURRENT TO BE USED AND SOLD BY THE UTILITY COMPANIES CONTROLLED BY THE SOUTHERN PUBLIC UTILITIES COMPANY. (R-126)

Appendix B.

OFFICIAL RELATIONSHIP AND AFFILIATIONS OF PIEDMONT AND NORTHERN DIRECTORS WITH SHIPPING AND OTHER INTERESTS

PIEDMONT AND NORTHERN RAILWAY DIRECTORS

G. G. Allen, New York, N. Y.	*Chairman Duke Endowment, which controls Duke Power Co.* (26, 126-127) *President Southern Power Co., which controls other Duke interests.* (26, 125-127)
C. C. Armstrong, Gastonia, N. C.	*President Armstrong Chain of Mills.* (26) *President several mills in Gastonia (N. C.), Rock Hill (S. C.) and various points.* (127)
J. W. Arrington, Greenville, S. C.	*President Union Bleachery, Greenville, S. C.* (26, 128, 150)
W. E. Beattie, Greenville, S. C.	*Formerly President Parker Chain of Mills in South Carolina.* (26, 128)
L. D. Blake, Belton, S. C.	*Head of Belton Cotton Mills, Belton, S. C.* (26, 128)
C. A. Cannon, Concord, N. C.	*President Cannon Chain of Mills.* (26, 128)
Stuart W. Cramer, Gastonia, N. C.	*Large mill owner.* (129)
J. T. Collins, Philadelphia, Pa.	
B. E. Geer, Greenville, S. C.	*President Chain of Mills in N. C. and S. C.* *Banker of Greenville, S. C.* *Trustee Duke Endowment.* (26, 128)
B. B. Gossett, Charlotte, N. C.	*Head of Mills at Charlotte, N. C., and Anderson, S. C.* (26, 128)
J. P. Gossett, Williamston, S. C.	*President Williamston Cotton Mills, Williamston, S. C.* (26) *President Mills at Anderson, S. C.* (128)
E. F. Greene, Boston, Mass.	*President Lockwood-Greene & Co., Boston, Mass.; Head of Large Mill Interests in South Carolina.* (27, 128)
C. E. Hutchison, Mt. Holly, N. C.	*Head of Mills at Mt. Holly, N. C.* (26, 128)
J. A. Law, Spartanburg, S. C.	*Mill Owner and Banker of Spartanburg, S. C.* (27, 128)
W. S. Lee, Charlotte, N. C.	*President Piedmont & Northern Ry., Vice-President and Chief Engineer Southern Power Co., Vice-President-Trustee Duke Endowment.* (128)
R. E. Ligon, Anderson, S. C.	*Head of Large Mill Interests at Anderson, S. C.* (27, 128)

PIEDMON

R. E. Ligon, Anderson, S. C.	*Head of Large Mill Interests at Anderson, S. C.* (27, 128)
A. F. McKissick, Greenville, S. C.	*Mill Owner and President Chamber of Commerce, Greenville, S. C.* (27, 128)
W. S. Montgomery, Spartanburg, S. C.	*President of Mills at Spartanburg and vicinity.* (27, 128)
V. M. Montgomery, Spartanburg, S. C.	*President of Mills in South Carolina and Georgia.* (27, 128)
J. C. Self, Greenwood, S. C.	*President Large Mill Interests at Greenwood, S. C., and adjacent towns.* (27, 129)
J. H. Separk, Gastonia, N. C.	*Treasurer Seven Cotton Mills.* (27, 129, 158)
A. W. Smith, Greenville, S. C.	*President Large Mill Interests at Greenville, S. C.* (27, 129)
E. A. Smythe, Flat Rock, N. C.	*President Cotton Mill Balfour, N. C., and identified with many important interests.* (27, 129)
E. Thomason, Charlotte, N. C.	*Vice-President and General Manager, Piedmont & Northern Railway.* (27, 132)
J. T. Woodside, Greenville, S. C.	*Large Mill Owner at Greenville, S. C., and other points in South Carolina.* (27, 129)

FILED
JAN 4 19
CHARLES ELMORE C

FILE COPY

No. 164

In the Supreme Court of the United States

OCTOBER TERM, 1929

PIEDMONT AND NORTHERN RAILWAY COMPANY AND NATIONAL ASSOCIATION OF RAILROAD UTILITIES COMMISSIONERS, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 164

PIEDMONT AND NORTHERN RAILWAY COMPANY AND National Association of Railroad Utilities Commissioners, appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, and Southern Railway Company, et al.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

MEMORANDUM FOR THE UNITED STATES

The United States submits this case upon the brief filed in behalf of the Interstate Commerce Commission.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CLAUDE R. BRANCH,
CHARLES H. WESTON,
Special Assistants to the Attorney General.

JANUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

Office Supreme Court, U. S.
FILED
JAN 6 1930
CHARLES ELMORE CROPLEY
CLERK

No. 164

In the Supreme Court of the United States

OCTOBER TERM, 1929

PIEDMONT & NORTHERN RAILWAY COMPANY AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY ET AL., APPELLEES

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

SUBJECT INDEX

	Page
OPINIONS	1
QUESTIONS	2
STATUTES	4
STATEMENT	7
SUMMARY	13–16
ARGUMENT THAT COMMISSION'S ORDER NOT JUDICIALLY REVIEWABLE	16
The Commission's order is a negative order within the meaning of decisions of this court holding that the Urgent Deficiencies Act does not confer jurisdiction upon the courts to set aside, annul, suspend, or enjoin negative orders of the Commission	16
ARGUMENT ON MERITS	25
The Commission's authority under Section 1 (18) to (22) of the Interstate Commerce Act is a prerequisite to the extension or construction of lines proposed by the Piedmont & Northern	25
THE PIEDMONT & NORTHERN'S PROPOSED LINES ARE NOT SUCH AS FALL WITHIN THE MEANING OF THE EXCEPTION CONTAINED IN SECTION 1 (22), EXCLUDING FROM COMMISSION AUTHORITY THE CONSTRUCTION OF STREET, SUBURBAN, OR INTERURBAN ELECTRIC RAILWAYS, WHICH ARE NOT OPERATED AS A PART OR PARTS OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION	
(a) The words "interurban electric railway" have no settled meaning at law and therefore resort must be had to the context of the statute to ensure correct interpretation	33
(b) Under the terms of Section 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates so as to yield a fair return on aggregate group property value	38

85173—30——1

ARGUMENT ON MERITS—Continued.

Page

(c) The provisions of Section 1 (18) to (22), herein involved, are particularly essential to the plan of Congress set up by Section 15a and other amendments in that they place restrictions upon competitive and unneeded new construction thereby preventing extravagant increase of the aggregate property value upon which rates paid by the public are to be based 41

(d) The difference in language between the exception in Section 1 (22) and the exception in Section 15a, whereby an electric interurban engaged in the general transportation of freight is expressly kept within the operation of the former but not mentioned in the latter, can not be ignored, but neither can it be given such broad scope as to exclude an electric road which is a real link with the steam roads in the country's general transportation system without seriously frustrating the remedial processes of the Transportation Act, 1920 46

(e) The plan of Congress for an effective general transportation system contemplates that its restrictive provisions, as well as those conferring benefits, should be uniformly applicable to all carriers constituting real links in the transportation chain 56

TABLE OF CASES

Chicago Junction Case, 264 U. S. 258 ..... 17, 46
Colorado v. *United States*, 271 U. S. 153 54
Dayton-Goose Creek Ry. Co. v. *United States*, 263 U. S. 456 ..... 42, 44
Increased Rates, 1920, 58 I. C. C. 220 28
Kansas City v. *McAdow*, 240 U. S. 51 37
Kirkpatrick v. *Piedmont Traction Company*, 170 N. C. 477 27
Lehigh Valley R. Co. v. *United States*, 243 U. S. 412 21
Lehigh Valley R. Co. v. *United States*, 234 Fed. 682 21
Los Angeles Valuation Case, 273 U. S. 299 24
New England Divisions Case, 261 U. S. 184 ..... 42, 44, 45
Omaha Street Railway v. *Int. Com Com.*, 230 U. S. 324 34
Procter & Gamble Co. v. *United States*, 225 U. S. 282 ..... 18, 20
Railroad Commission v. *So. Pac. Co.*, 264 U. S. 331 ..... 43, 46, 47, 52
South Carolina Fares and Charges, 60 I. C. C. 290 28
Spokane & Inland R. R. v. *United States*, 241 U. S. 344 ..... 37, 50, 56
Spokane & Inland R. R. v. *Campbell*, 241 U. S. 497 37
Texas & Pacific R. Co. v. *Gulf, etc., Ry.*, 270 U. S. 266 ..... 37, 44, 51
Texas v. *Eastern Texas R. Co.*, 258 U. S. 204 44

	Page
United States v. *New River Co.*, 265 U. S. 533	18
United States v. *Village of Hubbard*, 266 U. S. 474	36
Venner v. *Mich. Cent. R. Co.*, 271 U. S. 127	17
Virginian Ry. v. *United States*, 272 U. S. 658	40
Wisc. R. R. Comm. v. *C., B. & Q. R. Co.*, 257 U. S. 563	43, 44, 52, 54

STATUTES CITED

Commerce Court Act of 1910 (36 Stat. 539)	16, 17
Interstate Commerce Act, as amended (24 Stat. 379; 41 Stat. 456):	
Sec. 1 (18) to (22) (41 Stat. 477, 478)	2, 4–7, 17, 25, 33, 36, 38, 44, 45, 46
Sec. 3 (3), (4) (41 Stat. 479, 480)	43, 57
Sec. 5 (9) to (11) (37 Stat. 566)	21
Sec. 13 (4) (41 Stat. 484)	43
Sec. 15 (1) to (6) (41 Stat. 484 to 486)	39, 42, 43, 57
Sec. 15a (41 Stat. 489)	38, 40, 46
Sec. 20a (41 Stat. 494–497)	17, 36, 38, 40, 43, 49
Transportation Act, 1920	38, 41, 45, 49
Sec. 209 (41 Stat. 464)	39
Sec. 300 (41 Stat. 469)	39, 58
Urgent Deficiencies Act (38 Stat. 219)	2, 16, 17, 18

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 164

PIEDMONT & NORTHERN RAILWAY COMPANY AND National Association of Railroad and Utilities Commissioners, appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, and Southern Railway Company et al., appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (Circuit Judges Waddill and Northcott and District Judge Soper is reported in *Piedmont & Northern Ry. Co.* v. *United States et al.*, 30 F. (2d) 421 (R. 222.)

The Commission's report herein involved, *Proposed Construction of Lines by Piedmont & Northern Railway Company,* 138 I. C. C. 363, will be found at pages 29–81 of the record.

QUESTIONS

The Commission proceeding was instituted by application filed by the Piedmont & Northern under paragraphs (18) to (21) of section 1 of the Interstate Commerce Act asking authority to undertake certain extensions of its lines. The application was made with the understanding that the Piedmont & Northern reserved the right to contend that it was an interurban electric railway, not operated as part of a general steam system, within the meaning of paragraph (22) of section 1, which excludes such railways along with street and suburban electric railways from Commission authority over construction of new lines of railroad, and, after filing its application, the Piedmont & Northern moved to dismiss on that ground. The Commission, in its report, held that the Piedmont & Northern was not an interurban electric railway within the meaning of the exception to its jurisdiction contained in paragraph (22), and denied the application. Thereafter the Piedmont & Northern instituted this suit under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, U. S. C., Title 28, Sec. 47), asking in substance that the Commission's order, taking jurisdiction of its said application and

denying the same, be set aside and annulled. (R. 11.) In addition to filing answers to the petition, the United States and the Commission moved to dismiss on the grounds that the court was without jurisdiction to entertain the petition. (R. 97, 98, 101.) The lower court assumed jurisdiction and its decree, dismissing the petition of the Piedmont & Northern was based upon the merits.

The questions in issue before this Court are:

1. Did the lower court have jurisdiction to review the question of Commission authority over the extensions of lines proposed by the petitioner in a suit to enjoin an order, which denied the administrative relief prayed for?

2. Do the facts that the Piedmont & Northern operates between cities with electric locomotives and that a minor part of its service has characteristics peculiar to local electric railways make it an interurban electric railway within the meaning of the clause which excludes interurban electric railways not operated as part of a general steam system from Commission authority over the construction of new lines of railroad, despite the further facts that its major operations are identical with the steam roads, that 92 per cent of its revenues are derived from transportation of freight, and that 95 per cent of said freight is carload traffic, mostly interchanged with the steam roads and mostly moving interstate?

STATUTES

The provisions of the Interstate Commerce Act herein particularly involved are contained in paragraphs (18) to (22), inclusive, of section 1, and read as follows:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings.

Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate, and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of

this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the

Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

STATEMENT

Appellant, Piedmont & Northern, owns an electrically operated railroad, one segment of which extends from Greenwood, S. C., to Spartanburg, S. C., 88.9 miles, with a branch from Belton to Anderson, S. C., 11.3 miles, and another segment of which extends from Gastonia, N. C., to Charlotte, N. C., 23.5 miles, with a branch from Belmont Junction to Belmont, 3.2 miles. (R. 2, 36.) It connects with other railroads at the termini of both segments and is now engaged in interstate transportation, much the larger part whereof is freight, as a participating carrier in through routes and joint rates under filed and published tariffs. (R. 37, 38.) In the Commission proceeding it sought authority, under paragraphs (18) to (21) of section 1 of the

Interstate Commerce Act, to build two extensions of 53 and 75 miles, the first connecting Spartanburg, the northern terminus of the South Carolina segment, with Gastonia, the southern terminus of the North Carolina segment, and the other extending from Charlotte, the northern terminus of the North Carolina segment, to Winston-Salem, N. C. (R. 31.) The completed line would be 256 miles in length and would extend through from Greenwood, S. C., to Winston-Salem, N. C.

The existing lines connect with the street railway systems of the cities reached, but between terminals they are located on private right of way, only 2.9 miles of the main line mileage being in streets. (R. 37.) The Piedmont & Northern owns and operates the street railway system at Gastonia, but those at Charlotte, Greenville and Anderson are owned and operated by a separate corporation, namely, the Southern Public Utilities Company. (R. 37, 140.) The new lines, as proposed, would have connected with local street railways, also owned by the Southern Public Utilities Company, and would have provided independent through tracks to move freight traffic around the cities. (R. 37, 140.)

The South Carolina line of the Piedmont & Northern now has connections with the steam roads as follows: At Greenwood, with Seaboard Air Line, Southern Railway, and Charleston & Western Carolina; at Spartanburg, with Clinchfield Railroad,

Southern Railway, and Charleston & Western Carolina; and at Anderson, with Charleston & Western Carolina. The North Carolina line connects: At Gastonia with the Southern Railway; at Charlotte with the Seaboard Air Line and the Southern Railway; and at Belmont with the Southern Railway. (R. 28, 29.) The Piedmont & Northern's line, as proposed to be extended, would connect with the Norfolk & Western and the Southern Railway at Winston-Salem and, in addition to its above-mentioned connections at Greenwood, it would connect with the Georgia & Florida Railroad, whose extension to that point was under construction at the time of the hearings. One of the purposes of the proposed construction is to form a new through route for the movement of freight between the North, East, and West and Florida points. (R. 39, 154.)

About 92 per cent of the Piedmont & Northern's revenue is derived from freight (R. 140, 147), 95 per cent whereof consists of carload traffic. (R. 190.) Of 72,886 cars handled in 1926, 68,370 were interchanged with the steam roads (R. 37, 153, 147), and with the proposed lines built, the carrier estimated that it will handle 85,000 additional cars per annum in interchange (R. 147).

The Southern Railway Company, the Atlantic Coast Line R. R. Co., the Seaboard Air Line Ry. Co., the Carolina, Clinchfield & Ohio Ry., the Louisville & Nashville R. R. Co., and the Charleston &

Western Carolina Ry. Co. intervened in the Commission proceeding in opposition to the application. (R. 30.) Their opposition was based on the grounds that the proposed extensions would be exclusively competitive, serving no territory not already adequately served by existing lines and would be particularly detrimental to their interests and their ability to continue rendering efficient service because the same interests (the so-called Duke interests) which are in control of the Piedmont & Northern likewise control many industries in the tributary territory and are closely affiliated with others, by reason whereof and the generally great influence of those interests throughout the territory the steam roads would be placed in a peculiarly disadvantageous position in attempting to hold to their lines their fair share of the traffic. (R. 60–63, 68–76.) The Georgia & Florida Railroad, whose extension to Greenwood, under construction at the time of the hearing, will form the southern part of the new through route which it is proposed to establish, intervened in support of the application. (R. 56.) The application also had the support of the Governors and Utility Commissioners of North Carolina and South Carolina and of various municipal, civil, and trade organizations and of individual shippers. (R. 31.)

After filing its application with the Commission, the Piedmont & Northern moved to dismiss on the grounds that the Commission's authority did not

extend to construction of the character contemplated, its contentions being

> (1) That the proposed lines would merely complete pursuant to original plan a railroad, the construction whereof was begun prior to passage of the amendment to the Act requiring Commission authority for the building of new lines, has been prosecuted with reasonable diligence, and has never been abandoned,[1] and
>
> (2) That the proposed lines will form part of an electric interurban railway, not to be operated as a part of a general steam railway system and, therefore, are not lines, for the building whereof the Commission's authority is required under the statute.

The motion was first argued but decision thereon was deferred until after hearing on the merits. (R. 31.) Following such hearing the Commission's report and order, which appear as an exhibit to the petition herein, were issued, holding that the Commission had jurisdiction of the application and denying the same upon the finding that the present and future public convenience and necessity were not shown to require the construction of the proposed lines of railroad. (R. 19–80.)

Following issuance of the Commission's report and order the Piedmont & Northern filed its petition asking:

---

[1] The Piedmont & Northern's brief (p. 2) in this court abandons this contention.

> For a permanent injunction decreeing that the Commission was without jurisdiction of the application of petitioner, hereinbefore referred to and made a part of this petition as "Exhibit A," and that the Order of the Commission of April 3rd, 1928, taking jurisdiction of said application and denying the same, be set aside and annulled, and that the Commission be forever enjoined from taking any action or proceeding against your petitioner under said Order; and that upon the filing of this petition due proceedings shall be taken herein pursuant to the Statute and in accordance with the practice of this Court. (R. 11.)

On February 6, 1929, the lower court entered its decree denying the relief prayed for and dismissing the petition "for the reasons stated in its opinion" (R. 252). Those reasons were succinctly stated in the closing paragraph of its opinion to be that the Piedmont & Northern's

> freight traffic dominates so completely the field of its operations, and reaches so far, through interchange with other railroads, that it is outside the class which Congress intended to exclude from the control of the Commission. Even if in the beginning it was merely an interurban railroad, its essential character has so greatly changed, and its operations and interests have become so similar to those of a general steam carrier, that it is now well able to commit the mischiefs of uncontrolled expansion, which the Act was designed to prevent. (R. 251.)

In addition to their answers to the petition, the United States and Interstate Commerce Commission had, as heretofore said, moved to dismiss for lack of jurisdiction in the Court to entertain the petition on grounds, in substance, that the order of the Commission was a negative order within the meaning of decisions of this Court holding that negative orders of the Commission are not judicially reviewable. (R. 97, 98, 101.) Since the Court dismissed the petition on the merits it necessarily follows that the motions to dismiss for lack of jurisdiction were overruled.

SUMMARY

ARGUMENT THAT COMMISSION ORDER NOT JUDICIALLY REVIEWABLE

The Commission's order is a negative order within the meaning of decisions of this Court holding that the Urgent Deficiencies Act does not confer jurisdiction upon the courts to set aside, annul, suspend, or enjoin negative orders of the Commission.

ARGUMENT ON MERITS

1. The Piedmont & Northern, whose major operations are identical with those of the steam roads, whose revenues are 92 per cent derived from freight, whose said freight is 95 per cent carload traffic, mostly interchanged with the steam roads and mostly moving interstate, is not rendered an interurban electric railway within the meaning of the

clause, which excludes interurban electric railways not operated as part of a general steam system from Commission authority over the construction of new lines of railroad, merely because its motive power is electricity, because it operates between cities and because a very minor part of its service is of usual interurban electric character.

2. The words "interurban electric railway" have no settled meaning at law and, therefore, resort must be had to the context of the statute to ensure correct interpretation.

3. Under the terms of section 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates so as to yield a fair return on aggregate group property value, and section 15a and paragraphs (18)–(22) of section 1, herein involved, are among the interrelated amendnments added by the Transportation Act, 1920, with the one objective of promoting a generally effective transportation service at lowest possible just rates, and the latter provisions, namely, those placing restrictions upon competitive and unneeded new construction, are particularly essential to the plan in order that the aggregate property value upon which rates paid by the public are to be based shall not be enlarged beyond the general transportation needs.

4. While the fact that the electric interurbans excepted from the Commission's section 15a authority to make group adjustment of rates are

limited to those not engaged in general transportation of freight shows that uniformity of freight rates was regarded to be in all cases essential, the fact that the electric interurbans excepted from the Commission's authority over new construction and over the issuance of new securities are not so limited does not show that all railroads operating between cities with electric locomotives, whatsoever their character and purpose, are to be quit of the Commission's said authority, but merely demontrates that Congress desired to leave those matters to local authority, if such railroads are principally designed for the usual local electric railway purposes, even though to some extent intended for general freight transportation; to give the difference in language a broader scope than this would frustrate the plan of Congress in important particulars and would be contrary to the rule that excepting clauses should be narrowly construed so as not to destroy the remedial processes intended to be accomplished.

5. The "dovetail" relationship of the provisions comprising the plan of Congress for an effective and coordinated general transportation system refutes the Piedmont & Northern's position that it is permissible thereunder for it to avail itself of certain provisions, enabling it to become an important link with the steam roads in the general transportation chain, while at the same time refusing to submit itself to the restrictive provisions, essential to the good of the transportation system as a whole.

6. Appellant's reasoning to the effect that Congress, by using the words "interurban electric railway" in the exception to Commission authority over the construction of new lines, showed an intention to exclude all electric railroads operating between cities from the national field of authority because railroads constituting links in the national transportation chain were already employing electric locomotives when the 1920 Act was passed is not convincing.

ARGUMENT THAT COMMISSION'S ORDER NOT JUDICIALLY REVIEWABLE

The Commission's order is a negative order within the meaning of decisions of this Court holding that the Urgent Deficiencies Act does not confer jurisdiction upon the courts to set aside, annul, suspend, or enjoin negative orders of the Commission

The Commerce Court Act (36 Stat. 539) created the Commerce Court and conferred upon it the jurisdiction theretofore possessed by the circuit courts in respect of cases arising under the Interstate Commerce Act, including "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act (38 Stat. 219) abolished the Commerce Court and transferred its jurisdiction to the several District Courts of the United States. The petition in the court below purports to invoke this special jurisdiction and also the general equity jurisdiction of said court.

Section 1 (18)–(21) of the Act makes the Commission's authority a prerequisite to any extension or new construction of lines. The Piedmont & Northern applied for such authority and doubtless if the Commission had acted affirmatively thereon by granting the application its order would have been reviewable at the instance of competing railroads or others, whose interests might have suffered by the change so authorized of existing status of lines.

In the *Chicago Junction Case,* 264 U. S. 258, and in *Venner* v. *Michigan Central R. R. Co.*, 271 U. S. 127, affirmative orders under analogous provisions of the Act were held to be reviewable under the Urgent Deficiencies Act. In the one case the Commission had, after hearing, issued its certificate under section 5 (2) of the Interstate Commerce Act authorizing the railroad to acquire control of another carrier, and in the other case it had, under section 20a of said Act, authorized the railroad to issue new securities. These orders, although permissive rather than mandatory in form, were nevertheless affirmative orders authorizing change of existing status in respect of the matter involved. Similarly a rate or service order of the Commission which requires or authorizes a change in rates, service or practices is reviewable by the Courts because it is affirmative in that it makes, or permits

of, change in existing status.[2] But where, after consideration of the matter submitted, the Commission finds that no change of existing rates, service, or practices is warranted and its order, therefore, merely dismisses the complaint or denies the application, its order is negative in character and not reviewable by the courts.

In *Procter & Gamble* v. *United States,* 225 U. S. 282, the Commission, after hearing upon complaint of the Procter & Gamble Company with reference to demurrage regulations of the American Railway Association, had made a report finding that such regulations were not preferential or discriminatory, as charged, or otherwise in conflict with the Act to Regulate Commerce and had entered an order dismissing the complaint. The case was taken to the Commerce Court on petition to set aside the order of the Commission under the provisions of the Commerce Court Act which, as above said, are now embodied in the Urgent Deficiencies Act. The court found that it had jurisdiction to entertain the petition but found against the complainant on the merits. On appeal, this Court held that the lower court had improperly assumed jurisdiction because the Commission's order involved was not an affirmative order, that is to say, the Commission had not affirmatively exercised its

[2] The order in *United States* v. *New River Co.*, 265 U. S. 533, 541, although negative in form, permitted and authorized a change in existing administrative status.

administrative powers in the premises, but had left the existing status undisturbed.

The Court considered that the words of the Commerce Court Act conferring jurisdiction to enjoin, set aside, annul, or suspend any order of the Commission, when given "their natural significance" conferred "jurisdiction only to entertain complaints as to affirmative orders," (293), that is, that the Act conferred no mandatory injunctive power such as would be necessary to compel the Commission to substitute for its negative action and order in any proceeding, affirmative action and an affirmative order. In corroboration, the Court then went on to consider the context of the Commerce Court Act, particularly as interpreted in light of the fact that it was named an amendment to the Act to Regulate Commerce (295), and showed that any other view would tend to frustrate the policy of Congress to confer upon one body, to the end of uniformity, exclusive authority in respect of administrative matters. The conclusions there reached by this Court were, in substance, that the lower court had improperly taken jurisdiction, because its assumption of jurisdiction to set aside a negative order of the Commission, carried with it as a necessary corrollary, the assumption that it could grant the administrative relief denied by the Commission, thereby substituting its judgment for that of the Commission in respect of administrative matters exclusively entrusted by the Act to the Commission. (295–299.)

If it should be urged that in the instant case the lower court could have set aside the order of the Commission without passing upon administrative matters, that is, by merely reversing the conclusion of law reached by the Commission that its authority did extend to the construction of lines proposed by the Piedmont & Northern, the answer is, of course, that such situation would, to all intents and purposes, be the same in respect of any negative order. As stated in the *Procter & Gamble Case* a court's jurisdiction to review even affirmative orders of the Commission is confined to legal questions, namely, as to whether the Commission has exceeded its statutory or constitutional authority, or has exercised it arbitrarily beyond the power conferred. (298.) So that this Court, in holding that negative orders are not reviewable, has in effect said that the legal questions, as to which affirmative orders are reviewed, afford no basis for entertaining complaints against negative orders.

The reasons behind this are apparent in connection with the present case. On the one hand, the lower court's determination that the Commission had authority over the proposed lines was of no avail to the Piedmont & Northern because the court could not go further and review the administrative finding of the Commission that the lines were not desirable in the public interest. On the other hand, if the Commission had been without jurisdiction, then its order refusing authority for the extension

of lines would have been no obstacle to their being built. The risk to which the Piedmont & Northern is exposed arises, not from the order, but from the statute which prescribes penalties for undertaking, without Commission authority, new construction of a kind for which Commission authority is required by the Act.

This is shown in *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412, and the situation there presented is closely analogous to that here under consideration. In that case there was involved an order of the Commission entered under the Panama Canal Act of 1910. (Sec. 5 (9)–(11), I. C. Act; 37 Stat. 566.) That act prohibited, after July 1, 1914, any ownership by a railroad in any water carrier with which the railroad "does or may compete for traffic" and it authorized the Commission to determine questions of fact as to such competition or possibility of competition and to extend the time of ownership beyond July 1, 1914, if in its opinion any existing water service "is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration."[3] The rail carrier petitioned the Commission for such extension of time and for a hearing as to whether its ownership of a boat line

[3] See *Lehigh Valley R. Co.* v. *U. S.*, 234 F. 682, 684, 698, for discussion of this clause.

was in violation of the statute. The Commission, after hearing, decided that the railroad did or might compete with its boat line and ordered the petition dismissed. An injunction against that order was sought under the Urgent Deficiencies Act. The lower court dismissed the bill on the merits. On appeal to this Court, the decree was affirmed, but upon jurisdictional grounds as follows (414):

> We assume that the question whether the facts found by the Commission present a case of real or possible competition within the meaning of the statute is a question of law that could not be conclusively answered by the Commission; but still there is nothing for a court of equity to enjoin if all that the Commission has done is to decline to extend the time during which the railroad can keep its boat line without risk.
>
> The order of the Commission was negative in substance as well as in form. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 292, 293. The risk to which the railroad was left subject did not come from the order but from the above-mentioned section of the Panama Canal Act (amending section 5 of the Act to Regulate Commerce) making each day of violation a separate offence and the provision of the latter act, section 10, which imposes a possibly large fine. This risk is the same that it was before the order or that it would have been if appellant had not applied to the Commission except so far as the

findings establish facts that we believe there is no desire to dispute. Without going further it appears to us plain that the decree of the District Court dismissing the bill was right.

It will be noted that the above case, like the case under consideration, involved an application to the Commission for permission to do something which the statute forbade without Commission authority, and also, as in the instant case, there was the legal question as to whether the precise situation did fall within the basic prohibition of the Act. If it did not, Commission authority was unnecessary, for then continued ownership of the boat line would not have been a violation of the statute.

But regardless of whether or not Commission authority was necessary, if the Commission had granted its permission, the railroad could have continued its ownership of the boat line without risk of statutory penalties. Similarly in the instant case, if the Commission had granted the application, the Piedmont & Northern could have undertaken the new construction without subjecting itself to statutory penalties. However, in both cases the Commission's orders denied the relief asked, leaving the carriers confronted with possible statutory penalties if they should proceed without Commission authority. Still the risk to which the carriers were left subject did not come from the negative orders but from the statutes, in the one case depending upon whether the ownership by the rail carrier

of its boat line did, as a matter of law, violate the basic prohibition in the Act, and in the other case depending upon whether the Piedmont & Northern is, as a matter of law, the kind of rail carrier which the statute forbids to undertake extensions of its line without Commission authority. In both cases a final judicial determination of the aforesaid questions of law favorable to the contentions of the carriers would have permitted the carriers to proceed without liability to punishment or penalties, regardless of the views of the Commission upon those legal questions. But, since orders which merely deny the relief prayed for, thereby leaving the existing status unchanged, present nothing to be enjoined, they afford no basis for suits wherein such judicial determination may be properly invoked. In the instant case as in the *Lehigh Valley case*, the risk to which the railroad is left subject comes, not from the order, but from the statute and is the same that it was before the order or that it would have been if the Piedmont & Northern had not applied to the Commission.

If it should be contended that, despite the fact that the Commission's order is negative, its conclusion, that the Piedmont & Northern is included among the carriers which must secure Commission authority before extending their lines, clouds the rights of the Piedmont & Northern and upon such grounds may be enjoined, that would appear to be met by the *Los Angeles Valuation case*, 273 U. S.

299, 314, wherein this Court said in respect of a somewhat similar contention that neither the Commission's "utterances nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." The action of the Commission was negative and, therefore, all that is left is its expression of views that its authority does extend to the construction of lines proposed by the Piedmont & Northern.

ARGUMENT ON MERITS

The Commission's authority under Section 1 (18) to (21) of the Interstate Commerce Act is a prerequisite to the extension or construction of lines proposed by the Piedmont & Northern

THE PIEDMONT & NORTHERN'S PROPOSED LINES ARE NOT SUCH AS FALL WITHIN THE MEANING OF THE EXCEPTION CONTAINED IN SECTION 1 (22), EXCLUDING FROM COMMISSION AUTHORITY THE CONSTRUCTION OF STREET, SUBURBAN, OR INTERURBAN ELECTRIC RAILWAYS, WHICH ARE NOT OPERATED AS A PART OR PARTS OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION

Paragraph (18) of section 1 provides that "no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience require or will require" the same. Paragraph (22) of section 1 provides that the authority so conferred upon the Commission

> shall not extend to the construction * * * of spur, industrial, team, switch-

> ing or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The Piedmont & Northern, although claiming that it is an interurban electric railway not subject to section 1 (18) of the Act, nevertheless admits that it is a common carrier by railroad generally subject to the Act. (R. 2.)

The Piedmont & Northern is just as much an ordinary railroad as if it had heretofore been operating by steam power in interstate commerce and had only now decided to operate with electric locomotives. The construction of its road is admittedly that of a steam railway, except in respect of power transmission. (R. 39, 138, 144.) Most of its freight is handled in cars owned by steam railroads, and petitioner itself owns 165 automobile cars and 99 other box cars, all of which are of ordinary steam-railway type and move freely on foreign roads. (R. 38, 153, 148.) Between terminals it operates over private right of way and the proposed new lines would provide independent through track to move freight around the cities. (R. 37, 140.) Only 2.9 miles of the main-line mileage is in streets. (R. 37.) Freight trains are hauled by locomotives weighing from 55 to 95 tons each, rated to haul from 800 to 1,200 tons. (R. 37.)

The Piedmont & Northern belongs to the Per Diem Association, the American Railway Association, the Southern Freight Association, the Southern Weighing and Inspection Bureau, and Southeastern Demurrage Association. Its traffic manager stated that he did not know of any other electric interurban railroads that belong to those associations. (R. 153.) It is a party to the American Railway Express Company Uniform Express Contract. It is a party to the tariffs of steam railroads and follows their methods in matters of divisions of joint rates, interline billing, claim settlements, and all of its relations with shippers. (R. 165.) It has an extensive traffic organization and is represented by powers of attorney in nearly every traffic bureau of the United States. It has 502 published tariffs and in 1926 initiated 42 changes in rates to distant points. (R. 183, 38.)

In *Kirkpatrick* v. *Piedmont Traction Co.,* 170 N. C. 477, there was involved a suit by an abutting property owner against the Piedmont Traction Company (predecessor in ownership of the North Carolina segment of appellant's line) to recover damages for the laying of track and its operation on the highway adjacent to his property on the theory that it constituted an additional burden on the fee. It appears from the decision that the usual street railway does not, under the laws of North Carolina, subject adjacent property to an additional servitude. The court held that the Piedmont &

Northern's operations were of such character that they did constitute an additional servitude, remarking as follows:

> We are of opinion that, from the nature and description of the defendant's business as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a "steam railway" and can not be regarded as the ordinary street railway. The matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it.

This view of the North Carolina Court appears to be borne out by what was said by a former president of the Piedmont & Northern, Mr. Taylor, in argument before the Commission in *South Carolina Fares and Charges,* 60 I. C. C. 290, which case involved an application by the steam roads operating in South Carolina and the Piedmont & Northern for increased intrastate fares and line haul switching charges to conform to the interstate basis that had been prescribed in *Increased Rates, 1920,* 58 I. C. C. 220. Mr. Taylor's argument was made an exhibit in the Commission proceeding herein involved (R. 143) and among other things he said:

> If the Commission please, in my opinion there would be every reason in the world, and certainly the same reasons for excluding in any raise the electrically operated portion of the Chicago, Milwaukee & St.

> Paul, as there would be for excluding us. The same reasoning would apply to the Norfolk & Western, the undisputed and indisputable fact being that we are a railroad competing for interstate business, 65 per cent of our revenue being derived therefrom. We are a class one railroad, under your definition of the classification of railroads, and the only difference between us and any steam railroad operating in this country is the fact that we employ an electric locomotive, which the steam railroads some day must come to, instead of a steam locomotive. (R. 146.)

It is true that the Piedmont & Northern, although the volume of its business entitles it to a Class 1 rating and the bulk of that business is interchanged with the steam roads, is not operated as a part of a general steam system to the extent of being owned and managed by a steam railroad. It is also true that its motive power is furnished by electric locomotives. And, further, its operations are interurban in the sense of being conducted between cities. Similarly, if the word "interurban" carries with it no other meaning than "between cities," the operations of the great trunk lines of the country are likewise interurban, which would compel the strained construction that Congress, in excluding interurban electric railways from Commission authority, intended that the distinction between them and the steam roads should depend solely upon the character of the motive power. This can hardly

have been Congress' intention. The obvious purpose, shown not only by the association of the term "interurban" electric railway with street and suburban electric railways but also by the very fact that the whole of paragraph (22), wherein it is contained, constitutes an exception from Federal authority in favor of local authority, is that the term should signify railways whose operations are distinctively local and characterized by the predominance of passenger traffic at least. Measured by such standard the Piedmont & Northern's operations fall far outside the scope of the term "interurban electric railway."

The opinion of the lower court contains a very comprehensive statement of the local operations upon which the Piedmont & Northern relies to distinguish it from the ordinary steam road (R. 233–235), from which the following excerpts are taken:

> The existing lines of the Piedmont and Northern have connections with the street railway systems of the cities which it serves, acquired either by direct ownership or by contracts for trackage rights. Thereby its passenger cars within the cities en route become street railway facilities. Between the cities there are frequent stops for passengers at an average distance of 1.2 miles apart—that is to say, 106 stops in 128 miles of road. Forty-nine passenger trains daily traverse various parts of the line. There are more daily trains and more frequent stops than on the corresponding mileage of the Southern

Railway. Furthermore the spacing between the trains is more uniform. The passenger cars are motivated by self-contained motor units, and are lighted from a trolley. By reason of their equipment, they are not unacceptable upon steam lines.

* * * * *

* * * The difference between the local freight service of the Piedmont and Northern and that of the steam railroads consists chiefly in the use of the street-railway systems to gather up and deliver freight in the cities, the greater number of local freight stations on its lines between cities, the operation of its freight trains in smaller units and with greater frequency, and of a speedier delivery of local freight between near-by points.

The local passenger and local freight business thus described give to the road the peculiar features upon which the petitioner relies to distinguish it from the ordinary steam railroad. But this business constitutes only a small part of the petitioner's operations. Far greater is its general freight business, made possible by interchange relations with steam trunk lines in the south through which it is connected for the receipt and delivery of property with vast sections of the United States.

That the Piedmont & Northern's passenger and local freight service constitutes an insignificant part of its operations is strikingly borne out by the

evidence. 92 per cent of its revenue is derived from freight (R. 140, 147), 95 per cent whereof is carload traffic (R. 190), moving in trains of from 20 to 45 cars (R. 37). It is safe to say that such operations do not fall within the common acceptation of what constitutes interurban electric railway service. The bulk of the Piedmont & Northern's freight is interchanged with the steam roads. Of 72,886 cars handled in 1926, 68,370 cars were so interchanged (R. 37, 153, 147) and, with the proposed lines built, the carrier estimates it will handle 85,000 additional cars in interchange (R. 147). One of the main purposes of the proposed construction is to make of the Piedmont & Northern a link with the steam roads in a new through route for the movement of freight between the North, East and West and Florida points. (R. 10, 39, 56, 157, 162, 228.) It estimates that its increased revenue for the first year would be $3,890,016.57, (R. 141) an increase of $1,372,654.91 over 1926, (R. 37, 90) and that for the succeeding 5 years it would increase each year 8.4 per cent over the preceding year (R. 141). The carrier further estimates that of said total revenue of $3,890,016.57 for the first year, only $196,502 would be derived from passenger traffic as against $3,597,384 derived from freight,[4] and that all but 21 per cent of said freight would be interchanged with the steam roads. (R. 66.)

[4] The estimate also includes: Express revenue, $70,261, and miscellaneous, $25,870. (R. 66.)

The Piedmont & Northern Railroad, completed as proposed, would closely parallel existing railroads throughout its entire length and would touch no local point of importance not served by existing lines (R. 41, 52, 54, 74), and it seems that its expected increase in revenues would be mainly obtained at the expense of those other railroads now serving the locality (R. 166, 169), whose capacity, it was testified, was not only adequate but vastly in excess of present transportation needs (R. 42, 44).

a. The words "interurban electric railway" have no settled meaning at law and therefore resort must be had to the context of the statute to insure correct interpretation

The Piedmont & Northern's existing lines are, and its proposed lines would be, operated between cities with electric locomotives, but those facts are by no means sufficient to constitute the proposed construction that of an "interurban electric railway" within the meaning of the exception to the Commission's authority over new construction contained in paragraph (22) of section 1. The fact that the railroad is, and will continue to be, interurban does not distinguish it from ordinary railroads since the latter are likewise universally operated between cities and towns. The fact that, in addition, it will continue to employ electric locomotives still leaves the distinction indefinite, for certainly it will not be urged that the complete electrification of any one of the big trunk lines systems would remove it from the Commission's authority

under section 1 (18). The outstanding deductions that may be made from the courts' decisions differentiating particular electric railways from the "carrier by railroad" subject to the Act are: (1) That resort should be had to the context of the Act to determine whether the particular road's operations are of a kind intended to be subject to the regulatory authority, and (2) that the distinguishing characteristic of such electric railways as are not to be regarded as ordinary railroads, is the essentially local character of their operations, rendering them unfitted for doing the acts and committing the mischief intended to be regulated.

In *Omaha Street Ry.* v. *Int. Com. Com'n.,* 230 U. S. 324, the Court, in holding that an electrical railway operating in the streets of Omaha and Council Bluffs and also interstate between those cities was not a railroad within the meaning of that term as used in the Act, and that its interstate fares were not, therefore, subject to Federal regulation, was constrained to resort to the context of the Act to determine whether the purposes sought to be attained fitted in with the operations of the particular railroad. After commenting upon the conflict in the decisions of the state and Federal tribunals upon the subject, it was said at page 335:

> But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole.

And again at page 337:

> Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad "subject to the act" being such that they could not be obeyed by street railroads be cause of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word "railroad" can not be construed to include street railroad.

And still again, in distinguishing this road, which was interurban in that it operated between Omaha and Council Bluffs, from electric interurbans whose operations have a broader scope the Court said, at pages 337–338:

> But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight and is doing only a business appropriate to a street railroad. So that whatever the motive power or the size or speed of the cars is immaterial. In any event, there were "street cars" referred to in the act of Congress authorizing the construction of the Bridge from Council Bluffs to Omaha. (24 Stat. 501.) The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with Railroads

for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs.

In *U. S.* v. *Village of Hubbard,* 266 U. S. 474, the court reached the opposite conclusion as to another electrical interurban railway, namely, that it was a railroad under the Act subject to provisions forbidding the charging of fares that discriminate against interstate commerce. This decision rests mainly upon the grounds that since Congress, in conferring new powers upon the Commission in 1920, expressly excepted certain independently operated electric railways from some of the new powers so conferred, it thereby indicated that it "did not intend to deny to the Commission the power to regulate interurban railways in other respects." But this holding does not carry with it, as claimed by appellant, the further holding that all independent railroads operating between cities and using electric locomotives are interurban electric railways within the meaning of the excepting clauses referred to. As above shown, the excepting clause contained in section 1 (22), herein under consideration, excludes from Commission authority over new construction street, suburban, or interurban electric railways not operated as parts of a general steam railroad system. Similarly Section 20a, concerning the issue of new securities, excludes "a street, suburban, or interurban electric railway

which is not operated as part of a general steam railroad system of transportation."

Certainly it could not have been within the contemplation of Congress that, if a class I railroad, or any other operating between cities, should substitute electric for steam locomotives, thereafter it would not have to come to the Commission for authority to undertake new construction or to issue new securities. In this connection, too, the settled rule of this Court should be kept in mind that excepting clauses to remedial statutes should be narrowly construed so as not to defeat the remedial processes intended to be accomplished. *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344, 350.

Other notable decisions, wherein the Court has considered that, in determining the applicability of particular statutes to the operations of electric interurbans the safest guide was afforded by the context of the Act are: *Spokane & Inland R. R.* v. *United States, supra* (Safety Appliance Act); *Kansas City* v. *McAdow*, 240 U. S. 51, and *Spokane & Inland R. R.* v. *Campbell*, 241 U. S. 497 (Employers' Liability Act).

Also it is not out of place here to mention that in *Texas & Pacific Ry.* v. *Gulf, etc. Ry.*, 270 U. S. 266, involving the question as to whether a proposed track was an industrial track of a kind expressly excepted from Commission authority by paragraph (22) of section 1 (the paragraph here under consideration) the Court said at page 277:

A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920.

(b) Under the terms of section 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates so as to yield a fair return on aggregate group property value

Excepting clauses in respect of street, suburban, and interurban electric railways appear in two other sections of the Act as well as in Section 1 (22). As above said, the exception in section 20a, concerning the issue of new securities, is practically identical with that in section 1 (22), herein involved, in that it excludes from Commission authority "a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." Section 15a, which directs the Commission to adjust rates so as to yield a fair return upon the value of the properties of the carriers as a whole, or as a whole in rate groups, and which provides for the recapture of excess income from carriers earning more than such fair returns, excepts from its operation "(b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of

transportation or engaged in the general transportation of freight."[*]

The provisions with which we are here concerned and the above-mentioned sections 20a and 15a were added by the Transportation Act, 1920. Also in the latter Act, section 209, concerning the guaranty to carriers after the termination of federal control, excludes by paragraph (a) "a street or interurban electric railway, not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power," etc., and Section 300, which deals with the Labor Board, excludes by paragraph 1 "any street, interurban, or suburban electric railway unless such a railway is operating as a part of a general steam railroad system of transportation. * * *" The two latter sections constitute no part of the Interstate Commerce Act. But reverting to sections 20a and 15a we find that the excepting clause in the former is worded substantially the same as that contained in the paragraph herein particularly involved, but that the excepting clause of the latter excludes "interurban electric railways unless oper-

[*] Section 15(3) excepts from the Commission's authority to establish through routes and joint rates those "between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. (36 Stat. 539, 551, 552.)

ated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight.*"

Since 92 per cent of the Piedmont & Northern's revenues are derived from freight and the record and report convincingly show in many other ways the very minor importance of its passenger traffic, it is clear beyond question that it is not excluded from section 15a, but is, on the contrary, among the railroads enjoying the benefits of the revenue-producing provisions of that section. The Piedmont & Northern's representations that the Commission has informally ruled that it was not subject to section 20a and has not as yet treated it as subject to the valuation provisions of the Act are of course irrelevant. *Virginian Ry.* v. *U. S.*, 272 U. S. 658, 663. This is the first time that the nature of its operations have been fully considered by the Commission in a formal proceeding. And, moreover, since the Piedmont & Northern is among those carriers entitled under section 15a to a fair return upon property value it seems clear that it is subject to the valuation provisions of the Act, since section 15a (4) provides that, whenever a carrier's valuation has been determined under said provisions, it shall be deemed to be the value thereof for the purpose of determining aggregate value under said section 15a.

(c) The provisions of section 1 (18)–(22), herein involved are particularly essential to the plan of Congress set up by section 15a and other amendments in that they place restrictions upon competitive and unneeded new construction thereby preventing extravagant increase of the aggregate property value upon which rates paid by the public are to be based

The fact that there can be no question but that petitioner is subject to section 15a is a particularly important consideration in this controversy, for section 15a and the provisions here under consideration are both essential cogs in the machinery set up by the Transportation Act, 1920, with one great objective in view.

This Court has frequently had occasion to pass upon the changes made in the Interstate Commerce Act by the Transportation Act, 1920, and has directed attention to the fact that those amendments are interrelated parts of a whole scheme to attain a particular purpose. Broadly speaking, that purpose was to secure for the country as a whole an effective transportation service at lowest possible just rates. This result was to be reached in part by direct instructions to the Commission to fix rates that, as aforesaid, will yield the carriers as a whole revenue adequate for an effective transportation service plus a fair return. (Sec. 15a, (2).) But rates adequate for the carriers as a whole (average rates) would yield the strong carriers more than a just return, whereas under such rates, the weak carriers, in many instances, might not earn their operating expenses. The Act meets this contingency by provisions intended to bring about a dis-

tribution of earnings derived from the average rates as fixed, more nearly commensurate with the needs of the individual carriers. In part this is to be effected by the recapture of excess income from the strong carriers and the making of the fund available for use by the weak carriers (Sect. 15a (6); *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456) and in part through the Commission's authority to fix divisions of joint rates so as to give especial consideration to the needs of weak carriers. Sect. 15 (6); *New England Divisions Case,* 261 U. S. 184, 191. However, an effective transportation service, in the sense of transportation furnished at reasonable rates to shippers, could not be secured by provisions looking merely to adequate rates and a proper distribution of the revenues derived therefrom, without, in addition, having regard for economies in operation. It will be readily seen that a direction to the Commission to adjust interstate rates so as to yield a fair return on property value, would, unless hedged about with economical safeguards, not only lead to careless management and the charging of inequitably low intrastate rates but would also be an incentive to wasteful construction of unnecessary duplicating lines.

The Act does not contemplate the securing of an effective transportation service at any such cost, namely, by merely skyrocketing rates, but rather plans for the ultimate lowering of rates. The carriers are assured of a fair return only under honest,

efficient and economical operation. (Sect. 15 (a) (2).) Intrastate rates may not be fixed so low as to constitute a burden on interstate commerce. (Sect. 13 (4); *Wisconsin R. R. Comm.* v. *C. B. & Q. R. Co.*, 257 U. S. 563, 585.) And finally, as a corollary to the assurance given of rates that will yield a fair return, Congress has enacted provisions looking to economies to be effected by the closer cooperation of the carriers in rendering a more unified general transportation service. It will have been noted that the efficient and economical operations, which are a prerequisite under section 15a (2) to the fair return provided for, are the operations of the carriers as a whole, or as a whole in rate groups. Economical operation of the carriers as a whole can not exist where unrestricted competitive duplications of service are permitted and, accordingly, Congress enacted provisions intended to make unnecessary the wasteful duplication of facilities, such, for example, as the provisions looking to the common use of terminals and tracks. (Sect. 3 (4); *R. R. Comm.* v. *Southern Pacific Co.*, 264 U. S. 331) and the provisions enlarging the Commission's authority to require the carriers to join in the making of through routes and the establishing of joint rates. (Sect. 15, (1) to (6).) Congress at the same time placed direct restrictions upon duplication of plant by requiring the carriers to secure the Commission's authority before issuing new securities (Sect. 20a (1)–(11)) and before undertaking

new construction or extension of lines. (Sect. 1, (18)–(22).) The latter are the provisions, above quoted, with which we are directly concerned here.

This plan of Congress is made very clear in *Wisconsin R. R. Com.* v. *C. B. & Q. R. Co.,* 257 U. S. 563; *Dayton-Goose Creek Case,* 263 U. S. 456; *New England Division Case,* 261 U. S. 184; *Texas & Pac. Ry. Co.* v. *Gulf, Colo. & Santa Fe,* 270 U. S. 266, and *Texas* v. *Eastern Texas R. Co.,* 258 U. S. 204. That the securing of economies in operation through a better coordination of the services of the many carriers is essential to the general plan is shown in the *Texas & Pacific case* and the *New England Divisions case* at page 190, footnote 7. That the particular provisions herein involved, namely, those requiring the Commission's authority for the construction of new lines, are part and parcel of that plan is shown in the *Texas and Pacific case,* the *Wisconsin decision* at p. 585, and in the *Dayton-Goose Creek case* at page 478. In the first case, namely, *Texas & Pac. Ry. Co.* v. *Gulf, etc., Ry.,* 270 U. S. 266, an injunction was sought to prevent a railroad from building a new line without the authority of the Commission. The suit was defended on the ground that what was proposed to be constructed was a spur track expressly excepted by paragraph (22) from the requirement that the Commission's authority be first had and obtained. The contention was there the same as made here, namely, that the extension was of a class excepted

from the Commission's authority by said paragraph (22). The court considered that the best guide as to whether the proposed line was an extension or was within the excepted classes was furnished by giving consideration to the purpose served by the particular provision in the general scheme of regulation inaugurated by the Transportation Act. At page 277 the opinion reads:

> A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may may the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *The New England Divisions Case,* 261 U. S. 184; *The*

Chicago Junction Case, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331. The Act sought, among other things, to avert such losses.

(d) The difference in language between the exception in Section 1 (22) and the exception in Section 15a, whereby an electric interurban engaged in the general transportation of freight is expressly kept within the operation of the former but not mentioned in the latter, can not be ignored, but neither can it be given such broad scope as to exclude an electric road which is a real link with the steam roads in the country's general transportation system without seriously frustrating the remedial processes of the Transportation Act, 1920

The above review, then, shows that the prevention of wasteful duplication of lines was an essential part of the scheme of the Transportation Act to promote an effective transportation service at lowest possible rates.

Unquestionably some weight must be given to the difference in language of the excepting clause of section 15a and that of section 1 (22), herein under consideration, namely, to the fact that, while under the express language of section 15a an electric interurban is not excluded if it is engaged in general transportation of freight, such a carrier is not mentioned in section 1 (22). But it does not follow that the force to be given the difference in language should be of unlimited scope. The reason for the difference in language seems very clear. While an electric interurban, which has, in connection with its local business, built up a considerable interstate freight business, should for the sake of uniformity in rates, be included in the general rate

adjustments provided for in section 15a, still if its principal business continued to be the purely local carriage of passengers and small freight, the extension of its lines and facilities for such purposes likewise remained matters chiefly of local concern and should be left to local authority. But where, as here, the physical railroad, as linked up by the proposed extensions, will cross state lines and where, as here, the usual electric interurban passenger business is inconsequential, the exclusively local passenger and freight business is a small proportion of the whole and the avowed purpose of the extension of lines is to assure petitioner of a strong position as a participant in through traffic with large trunk-line railroads, the local interest in the new extensions certainly does not measure up to the federal interest in what, as said by the lower court, "would constitute the interior connecting link in a new joint through route and in effect" create "a new trunk line * * * in addition to those now provided by the Southern, the Seaboard, and the Atlantic Coast Line." (R. 238.)

In *R. R. Com'n. of Calif.* v. *Southern Pacific,* 264 U. S. 231, there was involved the question as to whether Commission authority under these very paragraphs (18)–(22) of section 1 was necessary for the rearrangement of track necessary in connection with the installation of a new union station, which had been ordered by the State Commission. While the Court conceded that state authority

might be exercised to require construction of a small local union station not involving changes in main track or substantial capital outlay, it then went on to say, at page 346:

> But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission.

Since in the instant case the issue is likewise as to whether the new construction is of a kind to which federal authority attaches or whether of a kind intended to be left to local authority, the above recognition by the Court that the nature of new construction and its consequences may constitute a change in kind, rather than in degree, seems particularly pertinent. While in the beginning the Piedmont & Northern's operations may have been principally of local interurban character, its revenues are now 92 per cent derived from freight, 95 per cent carload traffic and mostly interchanged with the steam roads. Its proposed construction would make of it a still more important link in the national transportation system.

To attribute full scope to the difference in language between the exception in section 15a and the

exception in section 1(22) seems impossible. Assume that a large trunk-line railroad should completely electrify its lines, it would then, in a broad sense, be an electric interurban railway, but still, because it is engaged in the general transportation of freight, it would be a carrier within the definition of section 15a whose property value is to be included with that of the other carriers of its rate group as a basis for rates that will yield a fair return. And yet, merely because the electric interurbans, excepted from the Commission's authority over new construction, are not in express words confined to those not engaged in freight transportation, it could, if unlimited scope is given the difference in language, duplicate the existing lines of competitors and extravagantly swell the aggregate property value of the rate group upon which the public is to pay rates that will yield a fair return.

Likewise, since the language of the excepting clause in section 20a is the same as that contained in the exception to the Commission's authority over new construction, such trunk line, or those in control of its stock, could issue new securities at will, thereby bringing back the conditions which induced Congress to clothe the Commission with authority over the issuance of new securities by the carriers.

This is entirely contrary to the well thought out and coordinated plan of the Transportation Act to provide an effective transportation service at lowest possible just rates. It gives too much weight to

the absence of language limiting the excepted electric interurbans to those not engaged in freight transportation and too little weight to the fact that, as aforesaid, the words electric interurban railways have themselves no settled meaning at law, definitely distinguishing them from ordinary railroads subject to the Act.

In *Spokane & Inland R. R.* v. *United States*, 241 U. S. 344, the question was involved as to whether the clause in the Safety Appliance Act excepting from its operation cars used upon street railways rendered that Act inapplicable to cars of an electric interurban which were both in street railway and interstate business. The Court held that the primary provisions of the Act were applicable, stating at page 350:

> We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in *plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished*

> *by the enactment.* That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad by operating a train for a trifling distance over tracks within the exception to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be controlling. (Italics ours.)

Similarly in the case at hand, if a broad construction rather than the narrow construction called for by the rule, should be given to the excepting clause of section 1 (22), which as said is the same as that in section 20a, a steam railroad could by electrifying its lines defeat the purpose of the Act.

As repeatedly said, it was not the purpose of Congress to promote an effective transportation service merely by enlarging the carrier's revenues through increased rates. When in Section 15a Congress directed the adjustment of rates that would yield a fair return on aggregate group property value, it intended to restrict at the same time the swelling of property values by unnecessary construction of new lines, and in other ways to do away with the economic waste attendant upon unrestricted competitive conditions. In *Texas & Pac. Ry. Co.* v. *Gulf, etc., Ry., supra*, the court said at page 278:

> But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest.

This purpose to prevent the swelling of property values is evidenced not alone by provisions requiring the Commission's authority for new construction but also by the provisions placing restrictions upon the issuance of new securities. *R. R. Com'n of Calif. v. Southern Pacific*, 264 U. S. 331, 347. An analogous amendment, made at the same time, is that guarding against such lowering of local intrastate rates as would unfairly burden interstate commerce in making good the fair return on aggregate property value. (Section 13 (4).) *In Wisconsin R. R. Comm. v. C., B. & Q. R. R.*, 257 U. S. 563, wherein the Court supported the Commission in removing the burden cast upon interstate commerce by unreasonably low local rates, it was said at pages 587-589:

> Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of section 15a to be ascertained pursuant to section

> 19a of the Interstate Commerce Act (37 Stat. 701; amended 41 Stat. 493), is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the States and must be segregated from that used in intrastate commerce. This is contrary to the construction which since the enactment of section 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of section 15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.

In connection with the above case it should be noted that not only street, suburban and interurban electric railways are excepted from the Commission's authority over new construction, but also intrastate steam carriers. This is apparent from the fact that section 1 (18) applies only to carriers subject to the Act and that section 1 (1) of the Act limits carriers subject to the Act to those engaged in interstate and foreign commerce. And yet it ap-

pears that the Commission has authority over the abandonment by an interstate steam road of a branch line wholly located in one State. In *Colorado* v. *United States*, 271 U. S. 153, the Court in upholding an order of the Commission authorizing, under this very paragraph (18) of section 1, the abandonment of lines located wholly within a State over the protest of the State, based its action on the same ground as is here urged in support of the Commission's order restricting unnecessary new construction. At page 163 the opinion reads:

> The sole objective of paragraphs 18–20 is the regulation of interstate commerce. * * * The exertion of the Federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318; or when the State authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266.

All of the contemporaneous amendments are interrelated parts of the whole plan of Congress. Each is necessary to ensure shippers that rates adjusted under section 15a to meet the proper needs of a growing commerce will not be unfairly placed nor based on the value of property extravagantly or speculatively constructed in excess of commercial needs. Unless those safeguards are to be given their intended effect shippers would be in a far better position if section 15a had never been enacted. What was said in the *Wisconsin Case, supra,* (p. 586) of the provision relating to burdensome intrastate rates is equally, if not more, applicable to the provisions intended to restrict unneeded new construction, namely, that "it is impossible to escape the dovetail relation between that provision and the purpose of section 15a."

In the instant case it is proposed to duplicate existing railroad lines. What is commonly understood as local electrical interurban service would be of minor importance and the chief purpose is to entrench the Piedmont & Northern in a strong position to compete with the steam roads. But the existing roads are shown to be adequate not only for present needs but for a vastly increased volume of traffic and, accordingly, the resulting increased group property value as a basis for rates would place an unnecessary burden upon interstate commerce and one entirely out of proportion to the possible improvement in local service.

Accordingly, since, as above shown, by far the greater part of the Piedmont & Northern's business is of steam-railway character and the purpose of the proposed extensions is primarily to enlarge, and to still further fortify its position in respect of business of that character, it is certain that the Piedmont & Northern is of the class of carrier fitted to commit the mischief which the statute is intended to prevent. This is the only reliable criterion available to determine whether it is among the carriers intended to be regulated or is within the class of carriers intended to be excepted from the statute. Moreover, the rule should be kept in mind that excepting clauses must be narrowly construed so as not to defeat the main objective of the statute (*Spokane & Inland Empire R. Co.* v. *U. S.*, above quoted from) and that in this case such main objective constitutes an important cog in the machinery set up by Congress to promote an effective general transportation service at lowest possible just rates.

(e) The plan of Congress for an effective general transportation system contemplates that its restrictive provisions as well as those conferring benefits should be uniformly applicable to all carriers constituting real links in the transportation chain

It has been shown that the Piedmont & Northern enjoys the advantages of the revenue producing provisions of the act (sec. 15a) and that its property value must therefore be included in aggregate property value upon which rates are based. It has also been shown that the main purpose of the proposed extensions of lines is to entrench the car-

rier more firmly as a link in the chain of the country's general transportation system, and in order to do so it must avail itself of the provisions of the act making it the duty of the carriers to afford reasonable and equitable facilities for interchange of traffic (sec. 3 (3)) and those provisions making it mandatory upon the Commission to establish through routes and joint rates whenever deemed desirable in the public interest.[6] It has been pointed out that one of the purposes of making through routes generally available to the carriers was to eliminate the incentive for the duplication of lines in competitive territory. It has also been pointed out that, while the proposed extensions of lines will go to swell the aggregate property value upon which rates to the public are based, they have been found by the Commission not to be needed in the public interest because existing lines afford ample transportation for existing commerce and its reasonably to be expected future growth. Accordingly, is it reasonable to suppose that Congress intended that such a carrier, participating substantially in the general transportation of commerce engaged in by the steam roads, should be permitted to avail itself of the advantages of certain of said interrelated provisions enacted by the Transportation Act while

[6] The Piedmont & Northern is enjoying all these benefits, including the Commission's protection against unduly low rates required by State authority. *South Carolina Fares and Charges*, 60 I. C. C. 290.

at the same time refusing to submit to the restrictive provisions to which other carriers are subject and which are essential for the welfare of the transportation system as a whole.

CONCLUSION

The decree of the court below dismissing the bill should be affirmed.

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1936

SUPREME COURT OF THE UNITED STATES.

No. 164.—October Term, 1929.

Piedmont & Northern Ry. Co. et al., Appellants, *vs.* United States et al.	On Appeal from the District Court of the United States for the Western District of South Carolina.

[February 24, 1930.]

Mr. Justice Brandeis delivered the opinion of the Court.

Paragraph 18 of § 1 of the Interstate Commerce Act, as amended by Transportation Act, 1920, February 28, c. 91, § 402, 41 Stat. 456, 477-8, prohibits any carrier by railroad subject to that Act from undertaking any extension of its lines or construction of new lines, without first obtaining from the Interstate Commerce Commission a certificate of public necessity and convenience. Paragraps 19 and 20 provide for applications for certificates and prescribe the procedure and mode of disposal. Paragraph 22 exempts from the scope of those provisions the construction of industrial and certain other tracks "located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The Piedmont & Northern Railway, a carrier by railroad subject to the Interstate Commerce Act, operates in interstate commerce about 128 miles of line in North and South Carolina, using exclusively electric locomotives. It determined to extend its lines 53 miles on one route and 75 miles on another, in order to connect with several steam railroads; and, believing that the above provisions of the Act were inapplicable, it intended to make the proposed extensions without securing from the Commission a certificate of public necessity and convenience. The Commission, learning informally of the project, advised the Railway by letter that before it "constructs any extensions to its line or issues any securities it will be expected to file appropriate applications for authority

therefor under sections 1 and 20a. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention." The letter called attention to the following passage in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 272:

"Whenever such an application is made, the Commission may pass incidentally upon the question whether what is called an extension is in fact such; for, if it proves to be only an industrial track, the Commission must decline, on that ground, to issue a certificate. A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track."

Upon receipt of this letter, the Railway filed an application for a certificate of public necessity and convenience; and it asserted therein that the proposed extensions were parts of a single project undertaken prior to the effective date of paragraph 18[1] and that it was an interurban electric railway within the exemption of paragraph 22. It accordingly moved that its application be dismissed for want of jurisdiction. The Commission overruled the motion; took jurisdiction; and entered an order denying the application on its merits. *Proposed Construction of Lines by Piedmont & Northern Ry. Co.*, 138 I. C. C. 363. This suit was then brought by the Railway against the United States in the federal court for western South Carolina, under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220, U. S. C., Tit. 28, § 47, and, as the bill states, also under "the general equity jurisdiction" of the court. The bill charges that if the order is not set aside, the Railway "will be prevented from constructing the new mileage"; and prays for "a permanent injunction decreeing that the Commission was without jurisdiction of the application", that the order "taking jurisdiction of said application and denying the same, be set aside and annulled, and that the Commission be forever en-

[1]Compare Application of Uvalde & Northern Ry. Co., 67 I. C. C. 316; Application of Texas, Oklahoma & Eastern R. R. Co., 67 I. C. C. 486; Application of Gulf Ports Terminal Ry. Co., 71 I. C. C. 738.

joined from taking any action or proceeding against your petitioner under said order." The National Association of Railroad and Utility Commissioners intervened as plaintiff. The Interstate Commerce Commission, the Southern Railway and other steam railroads intervened as defendants. The Commission moved to dismiss the bill for want of jurisdiction. The court, three judges sitting, denied the motion; and, the case being submitted on final hearing upon the pleadings and the record before the Commission, entered a decree dismissing the bill on the merits. 20 F. (2d) 403. A direct appeal to this Court was taken by both plaintiffs under § 238 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 939; U. S. C., Tit. 28, § 345.

Plaintiffs do not complain of the order's denial of a certificate of public necessity and convenience. They concede that no court has the power to compel the Commission to issue such a certificate, since no railroad subject to the provisions of the Act has a right to extend its lines. Therefore, the order denying a certificate, being negative in substance as well as in form, infringed no right of the Railway. Compare *Prentice & Gamble Co. v. United States*, 268 U. S. 282; *Lehigh Valley R. R. Co. v. United States*, 260 U. S. 411; *United States v. New River Co.*, 265 U. S. 533, 540. The plaintiffs have also abandoned, in this Court, their contention that the proposed extensions are part of a project undertaken prior to the effective date of paragraph 20. Their sole contention is that the court below and the Commission erred in not holding that the Railway is an interurban electric railway within the exception of paragraph 22. The defendants renew their objections to the jurisdiction of the court.

We think that the defendants' objection is well taken. There is no allegation of fact in the bill, and no provision in the statute, which supports the charge that the order will prevent the Railway from proceeding with the construction of the new mileage. The order is wholly unlike a decree which dismisses a bill in equity on the merits when it should have been dismissed for want of jurisdiction. Such a decree must be set aside because, otherwise, it might be held to operate as *res judicata*. Compare *Smith & Co. v. United States*, 276 U. S. 211, 215-6; *New Orleans v. Fisher*, 180 U. S. 185, 196; *Dowell v. Applegate*, 152 U. S. 327, 337-41. But neither the assumption of jurisdiction by the Commission nor its

denial of the application can operate as res judicata of the Railway's claim of immunity. If, as is contended, the Commission was without jurisdiction, the Railway is as free to proceed with the construction as if the application had not been made and the Commission had not acted. Nothing done by the Commission can prejudice the Railway's claim to immunity in any other proceeding.

It is true that, if the Railway builds without having secured a certificate, it may suffer serious loss. For, a court may hold, in an appropriate proceeding, that the Railway is within the purview of paragraph 18. And the Railway may be thus subjected to the penalties prescribed by paragraph 20. Those risks arise, however, not from the order, but from the statute. *Compare Lehigh Valley R. R. Co. v. United States*, 260 U. S. 655, 658. The order is entirely negative. It is not susceptible of violation and cannot call for enforcement. It does not finally adjudicate the Railway's standing; nor does it enjoin it to do or refrain from doing anything. The penalties provided in paragraph 20 are prescribed not for violation of an order of the Commission, but for violation of the provisions of the statute. And the apprehended loss will be no greater by reason of the Commission's order than if the Railway had commenced building without trying to secure a certificate, as was done in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266. There is no suggestion in the bill how the Commission or the Government could conceivably take any action under the order.

The action taken by the Commission may lend greater justification to the Railway's fear of the uncertainty inherent in the prophecy as to whether it will be held to be an interurban district within the meaning of paragraph 22. But it does not alter the substance of the remedy sought. That is the same as if the suit had been brought by the Railway prior to any action by the Commission, except that the Railway may be bound by the record made before the Commission. The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute. If the statute gives the Commission jurisdiction over the Railway's application, then concededly the order is not subject to attack. If, on the other hand, the statute does not confer the jurisdiction, then obviously the order is no obstacle to the Railway's plans. What plaintiffs are seeking is, therefore, in substance, a declaratory judgment that the Railway is within the exemption

contained in paragraph 22 of the Act. Such a remedy is not within either the statutory or the equity jurisdiction of Federal courts. Compare *Willing v. Chicago Auditorium Association*, 277 U. S. 274; *Great Northern Ry. Co. v. United States*, 277 U. S. 172, 182; *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74; *United States v. Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299.

There is nothing in the passage from *Texas & Pacific Ry. Co. v. United States*, 270 U. S. 266, 272, quoted by the Commission, which is inconsistent with the conclusion stated above. The case is entirely different from those cases where an application for a certificate is alleged to have been erroneously granted, as in *The Chicago Junction Case*, 264 U. S. 258 and *Colorado v. United States*, 271 U. S. 153. There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action.

Since plaintiffs' bill was dismissed on the merits when it should have been dismissed for want of jurisdiction, the decree must be reversed with directions to dismiss the bill for want of jurisdiction. *Southwood v. Gallardo*, 275 U. S. 56, 62; *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U. S. 462, 471; *Blacklock v. Small*, 127 U. S. 96, 105. Compare *United States v. Anchor Coal Co.*, 279 U. S. 812; *Gaar v. Butler*, 265 U. S. 366, 393; *Brownlow v. Schwartz*, 261 U. S. 216, 218.

Reversed with direction to dismiss the bill for want of jurisdiction.

A true copy.

Test:

Clerk, Supreme Court, U. S.